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# Law Magazine and Review.

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## I.—THE HISTORY OF ASSUMPSIT.\*

### I.—EXPRESS ASSUMPSIT.

THE mystery of Consideration has possessed a peculiar fascination for writers upon the English Law of Contract. No fewer than three distinct theories of its origin have been put forward within the last eight years. According to one view, "the requirements of consideration in all parol contracts is simply a modified generalization of *quid pro quo* to raise a debt by parol."† On the other hand, consideration is described as "a modification of the Roman principle of *causa*, adopted by equity, and transferred thence into the common law."‡ A third learned writer derives the action of assumpsit from the action on the case for deceit, the damage to the plaintiff in that action being the forerunner of the "detriment to the promisee," which constitutes the consideration of all parol contracts.§

\* Reprinted by permission from vol. ii. of the *Harvard Law Review* [1888]. The author has enlarged the notes in a few instances. These additions are enclosed in brackets.

† Holmes, *Early English Equity*, 1 L. Q. Rev. 171; The Common Law, 285. A similar opinion had been previously advanced by Professor Langdell. *Contracts*, § 47.

‡ Salmond, *History of Contract*, 3 L. Q. Rev. 166, 178.

§ Hare, *Contracts*, Ch. VII. and VIII.

To the writer of this essay \* it seems impossible to refer consideration to a single source. At the present day it is doubtless just and expedient to resolve every consideration into a detriment to the promisee incurred at the request of the promisor. But this definition of consideration would not have covered the cases of the sixteenth century. There were then two distinct forms of consideration : (1) detriment ; (2) a precedent debt. Of these detriment was the more ancient, having become established, in substance, as early as 1504. On the other hand, no case has been found recognizing the validity of a promise to pay a precedent debt before 1542. These two species of consideration, so different in their nature, are, as would be surmised, of distinct origin. The history of detriment is bound up with the history of special assumpsit, whereas the consideration based upon a precedent debt must be studied in the development of *indebitatus assumpsit*. These two forms of assumpsit will, therefore, be treated separately in the following pages.

The earliest cases in which an *assumpsit* was laid in the declaration were cases against a ferryman who undertook to carry the plaintiff's horse over the river, but who overloaded the boat, whereby the horse was drowned ; † against surgeons who undertook to cure the plaintiff or his animals, but who administered contrary medicines or otherwise unskilfully treated their patient ; ‡ against a smith for laming a horse while shoeing it ; § against a barber who undertook to shave the beard of the plaintiff with a clean and wholesome razor, but who performed his work negligently and unskilfully to

\* It seems proper to say that the substance of this article was in manuscript before the appearance of Judge Hare's book or Mr. Salmond's Essay.

† Y. B. 22 Ass. 94, pl. 41.

‡ Y. B. 43 Ed. III. 6, pl. 11 ; 11 R. II. Fitz. Ab. Act. on the Case, 37 ; Y. B. 3 H. VI. 36, pl. 33 ; Y. B. 19 H. VI. 49, pl. 5 ; Y. B. 11 Ed. IV. 6, pl. 10 ; *Powtuary v. Walton*, 1 Roll. Ab. 10, pl. 5 ; *Slater v. Baker*, 2 Wils. 359 ; *Sears v. Prentice*, 8 East, 348.

§ Y. B. 46 Ed. III. 19, pl. 19 ; Y. B. 12 Ed. IV. 13, pl. 9 (*semble*).

the great injury of the plaintiff's face;\* against a carpenter who undertook to build well and faithfully, but who built unskilfully.†

In all these cases, it will be observed, the plaintiff sought to recover damages for a physical injury to his person or property caused by the active misconduct of the defendant. The statement of the *assumpsit* of the defendant was for centuries, it is true, deemed essential in the count. But the actions were not originally, and are not to-day, regarded as actions of contract. They have always sounded in tort. Consideration has, accordingly, never played any part in the declaration. In the great majority of the cases and precedents there is no mention of reward or consideration. In *Powtuary v. Walton*‡ (1598), a case against a farrier who undertook to cure the plaintiff's horse, and who treated it so negligently and unskilfully that it died, it is said: "Action on the case lies on this matter without alleging any consideration, for his negligence is the cause of the action, and not the *assumpsit*." The gist of the action being tort, and not contract, a servant,§ a wife,|| or a child¶ who is injured, may sue a defendant who was employed by the master, the husband, or the father. Wherever the employment was not gratuitous, and the employer was himself the party injured, it would, of course, be a simple matter to frame a good count in contract. There is a precedent of *assumpsit* against a farrier for laming the plaintiff's horse.\*\* But in practice *assumpsit* was rarely, if ever, resorted to.

\* 14 H. VII. Rast. Ent. 2, b. 1.

† Y. B. 11 H. IV. 33, pl. 60; Y. B. 3 H. VI. 36, pl. 33; Y. B. 20 H. VI. 34, pl. 4; Y. B. 21 H. VI. 55, pl. 12; 18 H. VII. Keilw. 50, pl. 4; 21 H. VII. Keilw. 77, pl. 25; Y. B. 21 H. VII. 41, pl. 66; *Coggs v. Bernard*, 2 Ld. Ray. 909, 920; *Else v. Gatward*, 5 T. R. 143. See also *Best v. Yates*, 1 Vent. 268.

‡ 1 Roll. Ab. 10, pl. 5. See also to the same effect, Reg. Br. 105 b.

§ *Everard v. Hopkins*, 2 Bulst. 332.

|| *Pippin v. Sheppard*, 11 Price, 400.

¶ *Gladwell v. Steggall*, 5 B. N. C. 733.

\*\* 2 Chitty, Pl. (7 ed.) 458.

What, then, was the significance of the *assumpsit* which appears in all the cases and precedents, except those against a smith for unskilful shoeing? To answer this question it is necessary to take into account a radical difference between modern and primitive conceptions of legal liability. The original notion of a tort to one's person or property was an injury caused by an act of a stranger, in which the plaintiff did not in any way participate. A battery, an asportation of a chattel, an entry upon land, were the typical torts. If, on the other hand, one saw fit to authorize another to come into contact with his person or property, and damage ensued, there was, without more, no tort. The person injured took the risk of all injurious consequences, unless the other expressly assumed the risk himself, or unless the peculiar nature of one's calling, as in the case of the smith, imposed a customary duty to act with reasonable skill. This conception is well shown by the remarks of the judges in a case against a horse-doctor.\* Newton, C.J.: "Perhaps he applied his medicines *de son bon gré*, and afterwards your horse died; now, since he did it *de son bon gré*, you shall not have an action. . . . My horse is ill, and I come to a horse-doctor for advice, and he tells me that one of his horses had a similar trouble, and that he applied a certain medicine, and that he will do the same for my horse, and does so, and the horse dies; shall the plaintiff have an action? I say, No." Paston, J.: "You have not shown that he is a common surgeon to cure such horses, and so, although he killed your horse by his medicines, you shall have no action against him without an *assumpsit*." Newton, C.J.: "If I have a sore on my hand, and he applies a medicine to my heel, by which negligence my hand is maimed, still I shall not have an action unless he undertook to cure me." The court accordingly decided that a traverse of the *assumpsit* made a good issue.†

\* Y. B. 19 H. VI. 49, pl. 5.

† See to the same effect Y. B. 48 Ed. III. 6, pl. 11; 11 R. II. Fitz. Ab. Act. on Case, 37; Rast. Ent. 463 b.

It is believed that the view here suggested will explain the following passage in Blackstone, which has puzzled many of his readers : " If a smith's servant lames a horse while he is shoeing him, an action lies against the master, but not against the servant."\* This is, of course, not law to-day, and probably had ceased to be law when written. Blackstone simply repeated the doctrine of the Year-Books.† The servant had not expressly assumed to shoe carefully ; he was, therefore, no more liable than the surgeon, the barber, and the carpenter, who had not undertaken, in the cases already mentioned. This primitive notion of legal liability has, of course, entirely disappeared from the law. An *assumpsit* is no longer an essential allegation in these actions of tort, and there is, therefore, little or no semblance of analogy between these actions and actions of contract.

An express *assumpsit* was originally an essential part of the plaintiff's case in another class of actions, namely, actions on the case against bailees for negligence in the custody of the things intrusted to them. This form of the action on the case originated later than the actions for active misconduct, which have been already considered, but antedates, by some fifty years, the action of *assumpsit*. The normal remedy against a bailee was *detinue*. But there were strong reasons for the introduction of a concurrent remedy by an action on the case. The plaintiff in *detinue* might be defeated by the defendant's wager of law ; if he had paid in advance for the safe custody of his property, he could not recover in *detinue* his money, but only the value of the property ; *detinue* could not be brought in the King's Bench by original writ ; and the procedure generally was less satisfactory than that in case. It is not surprising, therefore, that the courts permitted bailors to sue in case. The innovation would seem to have come in

\* 1 Bl. Com. 431.

† Y. B. 11 Ed. IV. 6, pl. 10 ; 1 Roll. Ab. 94, pl. 1 ; 2 Roll. Ab. 95, pl. 1.

as early as 1449.\* The plaintiff counted that he delivered to the defendant nine sacks of wool to keep ; that the defendant, for six shillings paid him by the plaintiff, assumed to keep them safely, and that for default of keeping they were taken and carried away. It was objected that detinue, and not case, was the remedy. One of the judges was of that opinion, but in the end the defendant abandoned his objection ; and Statham adds this note : . . . "*et credo* the reason of the action lying is because the defendant had six shillings which he [plaintiff] could not recover in detinue." The bailor's right to sue in case instead of detinue was recognized by implication in 1472,† and was expressly stated a few years later.‡

The action against a bailee for negligent custody was looked upon, like the action against the surgeon or carpenter for active misconduct, as a tort, and not as a contract. The immediate cause of the injury in the case of the bailee was, it is true, a nonfeasance, and not, as in the case of the surgeon or carpenter, a misfeasance. And yet, if regard be had to the whole transaction, it is seen that there is more than a simple breach of promise by the bailee. He is truly an actor. He takes the goods of the bailor into his custody. This act of taking possession of the goods, his *assumpsit* to keep them safely, and their subsequent loss by his default, together made up the tort. The action against the bailee sounding in tort, consideration was no more an essential part of the count than it was in actions against a surgeon. Early in the reign of Henry VIII., Moore, Sergeant, said, without contradiction, that a bailee, with or without reward, was liable for careless loss of goods either in detinue or case ;§ and it is common

\* Statham Ab. Act. on Case (27 H. VI.).

Y. B. 12 Ed. IV. 13, pl. 10.

† Y. B. 2 H. VII. 11, pl. 9 ; Keilw. 77, pl. 25 ; Keilw. 160, pl. 2 ; Y. B. 27 H. VIII. 25, pl. 3.

Keilw. 160, pl. 2 (1510).

learning that a gratuitous bailee was charged for negligence in the celebrated case of *Coggs v. Bernard*. If there was, in truth, a consideration for the bailee's undertaking, the bailor might, of course, declare in contract, after special assumpsit was an established form of action. But, in fact, there are few instances of such declarations before the reign of Charles I.\* Even since that time, indeed, case has continued to be a frequent, if not the more frequent, mode of declaring against a bailee.† Oddly enough, the earliest attempts to charge bailees in assumpsit were made when the bailment was gratuitous. These attempts, just before and after 1600, were unsuccessful, because the plaintiffs could not make out any consideration.‡ The gratuitous bailment was, of course, not a benefit, but a burden to the defendant; and, on the other hand, it was not regarded as a detriment, but an advantage to the plaintiff. But in 1623 it was finally decided, not without a great straining, it must be conceded, of the doctrine of consideration, that a bailee might be charged in assumpsit on a gratuitous bailment.§

The analogy between the action against the bailee and that against the surgeon holds also in regard to the necessity of alleging an express *assumpsit* of the defendant. Bailees whose calling was of a *quasi* public nature were chargeable by the custom of the realm, without any express undertaking. Accordingly, so far as the reported cases and precedents disclose, an *assumpsit* was never laid in a count in case against

\* [As late as 1745, it was objected in *Alcorn v. Westbrook* 1 Wils. 115, that Assumpsit was not the proper form of action against a pledgee.]

† In *Williams v. Lloyd*, W. Jones, 179; Anon., Comb. 371; *Coggs v. Bernard*, 2 Ld. Ray. 909; *Shelton v. Osborne*, 1 Barnard, 260; 1 Selw. N. P. (13 ed.) 348, s. c.; *Brown v. Dixon*, 1 T. R. 274, the declarations were framed in tort.

‡ *Howlet v. Osborne* Cro. El. 380; *Riches v. Briggs*, Cro. El. 883, Yelv. 4; *Game v. Harvie*, Yelv. 50; *Pickas v. Guile*, Yelv. 128. See also *Gellye v. Clark*, Noy, 126, Cro. Jac. 188, s. c.; and compare *Smith's case*, 3 Leon. 88.

§ *Wheatley v. Low*, Palm. 281, Cro. Jac. 668, s. c.



a common carrier \* or innkeeper † for the loss of goods. They correspond to the smith, who, from the nature of his trade, was bound to shoe skilfully. But, in order to charge other bailees, proof of an express *assumpsit* was originally indispensable. An *assumpsit* was accordingly laid as a matter of course in the early cases and precedents. Frowyk, C.J., says, in 1505, that the bailee shall be charged "*per cest parol super se assumpsit*." ‡ In *Fooley v. Preston*, § Anderson, Chief Justice of the Common Bench, mentions, it is true, as a peculiarity of the Queen's Bench, that "it is usual and frequent in B. R. if I deliver to you an obligation to rebail unto me, I shall have an action upon the case without an express promise." And yet, twelve years later, in *Mosley v. Fosset* || (1598), which was an action on the case for the loss of a gelding delivered to the defendant to be safely kept and redelivered on request, the four judges of the Queen's Bench, although equally divided on the question whether the action would lie without a request, which would have been necessary in an action of detinue, "all agreed that without such an *assumpsit* the action would not lie." ¶ But with the lapse of time an express undertaking of the bailee ceased to be required, as we have already seen it was dispensed with in

\* 1 Roll. Ab. 2, pl. 4; *Rich v. Kneeland*, Hob. 17; 1 Roll. Ab. 6, pl. 4; *Kenrig v. Eggleston*, Al. 93; *Nichols v. More*, 1 Sid. 36; *Morse v. Shue*, 1 Vent. 190, 238; *Levett v. Hobbs*, 2 Show. 127; *Chamberlain v. Cooke*, 2 Vent. 75; *Matthews v. Hoskins*, 1 Sid. 244; *Upshare v. Aidec*, Com. 25; *Herne's Pleader*, 76; Brownl. Ent. 11; 2 Chitty, Pl. (1 ed.) 271.

† Y. B. 42 Lib. Ass. pl. 17; Y. B. 2 H. IV. 7, pl. 31; Y. B. 11 H. IV. 45, pl. 18; *Cross v. Andrews*, Cro. El. 622; *Gellye v. Clark*, Cro. Jac. 189; *Beedle v. Norris*, Cro. Jac. 224; *Herne's Pleader*, 170, 249.

‡ Keilw. 77, pl. 25.

§ 1 Leon. 297.

|| Moore, 543, pl. 720; 1 Roll. Ab. 4, pl. 5, s. c. The criticism in *Holmes' Common Law*, 155, n. 1, of the report of this case seems to be without foundation.

¶ See also *Evans v. Yeoman* (1635), Clayt. p. 33: "Assumpsit. The case upon evidence was, that whereas the plaintiff did deliver a book or charter to the defendant, it was holden that unless there had been an express promise to redeliver this back again, this action will not lie."

the case of a surgeon or carpenter. The acceptance of the goods from the bailor created a duty to take care of them in the same manner that a surgeon who took charge of a patient became bound, without more, in modern times, to treat him with reasonable skill.

*Symons v. Darknoll*\* (1629) was an action on the case against a lighterman, but not a common lighterman, for the loss of the plaintiff's goods. "And, although no promise, the court thought the plaintiff should recover." Hyde, C.J., adding: "Delivery makes the contract." The later precedents in case, accordingly, omit the *assumpsit*.†

The writer is tempted to suggest here an explanation of an anomaly in the law of waste. If, by the negligence of a tenant-at-will, a fire breaks out and destroys the house occupied by him as tenant, and another also belonging to his landlord, he must respond in damages to the landlord for the loss of the latter, but not of the former. *Lothrop v. Thayer*, 138 Mass. 466. This is an illustration of the rule that a tenant-at-will is not liable for negligent or permissive waste. Is it not probable that the tenant-at-will and a bailee were originally regarded in the same light? In other words, neither was bound to guard with care the property intrusted to him in the absence of a special undertaking to that effect. This primitive conception of liability disappeared in the case of chattels, but persisted in the case of land, as a rule affecting real property would naturally persist. In the *Countess of Salop v. Crompton*, Cro. El. 777, 784, 5 Rep. 13, s. c., a case against a tenant-at-will, Gawdy, J., admits the liability of a shepherd for the loss of sheep, "because he there took upon him the charge. But here he takes not any charge upon him but to occupy and pay his rent." So also in *Coggs v. Bernard*, 2 Ld. Ray. 909. Powell, J., referring to the case of the Countess of Salop, says: "An action will not lie against a

\* Palm. 523. See also *Stanian v. Davies*, 2 Ld. Ray. 795

† 2 Inst. Cler. 185; 2 Chitty, Pl. (7 ed.) 506, 507.

tenant-at-will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that in consideration the lessor would let him live in the house he promised to deliver up the house to him again in as good repair as it was then, the action would have lain upon that special undertaking. But there the action was laid generally."

There is much in common between the two classes of actions on the case already discussed and still a third group of actions on the case, namely, actions of deceit against the vendor of a chattel upon a false warranty. This form of action, like the others, is ancient, being older, by more than a century, than special assumpsit. The words *super se assumpsit* were not used, it is true, in a count upon a warranty; but the notion of undertaking was equally well conveyed by "*warrantizando vendidit.*"

Notwithstanding the undertaking, this action also was, in its origin, a pure action of tort. In what is, perhaps, the earliest reported case upon a warranty,\* the defendant objects that the action is in the nature of covenant, and that the plaintiff shows no specialty but "*non allocatur*, for it is a writ of trespass." There was regularly no allusion to consideration in the count in case; if, by chance, alleged, it counted for nothing.† How remote the action was from an action of contract appears plainly from a remark of Choke, J.: "If one sells a thing to me, and another warrants it to be good and sufficient, upon that warranty made by parol, I shall not have an action of deceit; but if it was by deed, I shall have an action of covenant."‡ That is to say, the parol contract of guaranty, so familiar in later times, was then unknown. The same judge, and Brian, C.J., agreed, although Littleton, J., inclined to the opposite view, that if a servant warranted

\* Fitz. Ab. Monst. de Faits, pl. 160 (1383).

† *Moor v. Russel*, Skin. 104; 2 Show. 284, s. c.

‡ Y. B. 11 Ed. IV. 6, pl. 10.

goods which he sold for his master, no action would lie on the warranty. The action sounding in tort, the plaintiff, in order to charge the defendant, must show, in addition to his undertaking, some act by him, that is, a sale; but the owner was the seller, and not the friend or servant, in the cases supposed. A contract, again, is, properly, a promise to act or forbear in the future. But the action under discussion must be, as Choke, J., said, in the same case, upon a warranty of a thing present, and not of a thing to come. A vendor who gives a false warranty may be charged to-day, of course, in contract; but the conception of such a warranty, as a contract, is quite modern. *Stuart v. Wilkins*,\* decided in 1778, is said to have been the first instance of an action of assumpsit upon a vendor's warranty.

We have seen that an express undertaking of the defendant was originally essential to the actions against surgeons or carpenters, and bailees. The parallel between these actions and the action on a warranty holds true on this point also. A case in the *Book of Assizes* is commonly cited, it is true, to show that from very early times one who sold goods, knowing that he had no title to them, was liable in an action on the case for deceit.† This may have been the law.‡ But, this possible exception apart, a vendor was not answerable to the vendee for any defect of title or quality in the chattels sold, unless he had either given an express warranty, or was under a public duty, from the nature of his calling, to sell articles of a certain quality. A taverner or vintner was bound as such to sell wholesome food and drink.§ Their position was analogous to that of the smith, common carrier, and innkeeper.

The necessity of an express warranty of quality in all other

\* 3 Doug. 18.

† 3 Y. B. 42, Lib. Ass. pl. 8.

‡ But see *Kenrick v. Burges*, Moore, 126, per Gawdy, J., and *Roswell v. Vaughan*, Cro. Jac. 196, per Tanfield, C.B.

§ Y. B. 9 H. VI. 53, pl. 37; Keilw. 91, pl. 16; *Roswell v. Vaughan*, Cro. Jac. 196; *Burnby v. Bollett*, 16 M. & W. 644, 654.

cases is illustrated by the familiar case of *Chandelor v. Lopus* (1606-1607). The count alleged that the defendant sold to the plaintiff a stone, affirming it to be a bezoar stone, whereas it was not a bezoar stone. The judgment of the King's Bench, that the count was bad, was affirmed in the Exchequer Chamber, all the justices and barons (except Anderson, C.J.) holding, "that the bare affirmation that it was a bezoar stone, without warranting it to be so, is no cause of action; and although he knew it to be no bezoar stone, it is not material; for every one in selling his wares will affirm that his wares are good, or that his horse is sound; yet, if he does not warrant them to be so, it is no cause of action." The same doctrine is repeated in *Bailie v. Merrill*.† The case of *Chandelor v. Lopus* has recently found an able defender in the pages of this *Review*.‡ In the number for November, 1887, Mr. R. C. McMurtrie urges that the decision was a necessary consequence of the rule of pleading, that the pleader must state the legal effect of his evidence, and not the evidence itself. It is possible that the judgment would have been arrested in *Chandelor v. Lopus*, if it had come before an English court of the present century.§ But it is certain that the judges in the time of James I. did not proceed upon this rule of pleading. To their minds the word "warrant," or, at least, a word equally importing an express undertaking, was as essential in a warranty as the words of promise were in the Roman *stipulatio*. The modern doctrine of implied warranty, as stated by Mr. Baron Parke in *Barr v. Gibson*,|| "But the bargain and sale of a chattel, as being of a particular description, does imply a contract that the article sold is of that description," would have sounded as strangely in the ears of

\* Dy. 75 a, n. (23); Cro. Jac. 4. See also 8 Harv. L. 282.

† 1 Roll. R. 275. See also *Leakins v. Clizard*, 1 Keb. 522, per Jones.

‡ 1 Harv. L. Rev. 191.

§ But see *Crosse v. Gardner*, 3 Mod. 261, Comb. 142, s. c.; *Medina v. Stoughton*, 1 Ld. Ray. 593, 1 Salk. 210, s. c.

|| 3 M. & W. 390.

the early lawyers as their archaic doctrine sounds in ours. The warranty of title stood anciently upon the same footing as the warranty of quality.\* But in Lord Holt's time an affirmation was equivalent to a warranty,† and to-day a warranty of title is commonly implied from the mere fact of selling.‡

However much the actions against a surgeon or carpenter for misfeasance, those against a bailee for negligent custody, and, above all, those against a vendor for a false warranty, may have contributed, indirectly, to the introduction of special assumpsit, there is yet a fourth class of cases which seem to have been more intimately connected with the development of the modern parol contract than any of those yet considered. These cases also, like the actions for a false warranty, were actions on the case for deceit. That their significance may be fully appreciated, however, it will be well to give first a short account of the successive attempts to maintain an action for the simple breach of a naked parol promise, *i.e.* for a pure nonfeasance.

The earliest of these attempts was in 1400, when an action was brought against a carpenter for a breach of his undertaking to build a house. The court was unanimous against the plaintiff, since he counted on a promise, and showed no speciality.§ In the same reign there was a similar case with the same result.|| The harmony of judicial opinion was somewhat interrupted fifteen years later in a case against a millwright on a breach of promise to build a mill within a certain time. Martin, J., like his predecessors, was against the action; Cockayne, J., favoured it. Babington, C.J., at first agreed with Cockayne, J., but was evidently shaken by

\* Co. Lit. 102 a; *Springwell v. Allen* (1649), Al. 91, 2 East, 448, n. (a), s. c.

† *Crosse v. Gardner*, 3 Mod. 261; 1 Show. 65, s. c.; *Medina v. Stoughton*, 1 Ld. Ray. 593, 1 Salk. 210, s. c.

‡ *Eichholtz v. Bannister*, 17 C. B. N. s. 708; Benj. Sale (3 ed.), 620-631.

§ Y. B. 2 H. IV. 3, pl. 9.

|| Y. B. 11 H. IV. 33, pl. 60. See also 7 H. VI. 1, pl. 3.

the remark of Martin, J. : " Truly, if this action is maintained, one shall have trespass for breach of any covenant \* in the world," for he then said : " Our talk is idle, for they have not demurred in judgment. Plead and say what you will, or demur, and then it can be debated and disputed at leisure." The case went off on another point.† Martin, J., appears finally to have won over the Chief Justice to his view, for, eight years later, we find Babington, C.J., Martin and Cotesmore, JJ., agreeing in a *dictum* that no action will lie for the breach of a parol promise to buy a manor. Paston, J., showed an inclination to allow the action.‡ In 1435 he gave effect to this inclination, holding, with Juyn, J., that the defendant was liable in an action on the case for the breach of a parol promise to procure certain releases for the plaintiff.§ But this decision was ineffectual to change the law. Made without a precedent, it has had no following. The doctrine laid down in the time of Henry IV. has been repeatedly reaffirmed.||

\* Covenant was often used in the old books [for example, in *Sharrington v. Strotton*, Plow. 298, *passim* ; *Diversite of Courts*, Chancery] in the sense of agreement, a fact sometimes overlooked, as in Hare, *Contracts*, 138, 139.

† Y. B. 3 H. VI. 36, pl. 33. One of the objections to the count was that it did not disclose how much the defendant was to have for his work. The remarks of the judges and counsel upon this objection seem to have been generally misapprehended. Holmes, *Common Law*, 267, 285 ; Hare, *Contracts*, 162. The point was this : Debt would lie only for a sum certain. If, then, the price had not been agreed upon for building the mill, the millwright, after completing the mill, would get nothing for his labour. It could not, therefore, be right to charge him in an action for refusing to throw away his time and money. Babington, C.J., and Cockayne, J., admitted the force of this argument, but the latter thought it must be intended that the parties had determined the price to be paid. There is no allusion in the case to a *quid pro quo*, or a consideration as a basis for the defendant's promise. Indeed, the case is valueless as an authority upon the doctrine of consideration.

‡ Y. B. 11 H. VI. 18, pl. 10, 24, pl. 1, 55, pl. 26.

§ Y. B. 14 H. VI. 18, pl. 58.

|| Y. B. 20 H. VI. 25, pl. 11, per Newton, C.J. ; Y. B. 20 H. VI. 34, pl. 4, per Ayscoghe, J. ; Y. B. 21 H. VI. 55-12 ; Y. B. 37 H. VI. 9, pl. 18, per Moyle, J. ; Y. B. 2 H. VII. 11, pl. 9, and Y. B. 2 H. VII. 12, pl. 15, per Townsend, J. ; 18 H. VII. Keilw. 50, pl. 4, per curiam ; Doct. & St. Dial II. c. 24 ; *Coggs v. Bernard*, 2 Ld. Ray. 909, 919, per Lord Holt ; *Elsie v. Gatward*, 5 T. R. 143. Newton, C.J., said on several occasions (Y. B. 19 H. VI. 24 b,

The remaining actions on the case for deceit before mentioned may now be considered. In the first of these cases the writ is given, and the reader will notice the striking resemblance between its phraseology and the later count in *assumpsit*. The defendant was to answer for that he, for a certain sum to be paid to him by the plaintiff, undertook to buy a manor of one J. B. for the plaintiff; but that he, by collusion between himself and one M. N., contriving cunningly to defraud the plaintiff, disclosed the latter's evidence, and falsely and fraudulently became of counsel with M. N., and bought the manor for M. N., to the damage of the plaintiff. All the judges agreed that the count was good. Babington, C.J.: "If he discovers his counsel, and becomes of counsel for another, now that is a deceit, for which I shall have an action on my case." Cotesmore, J.: "I say, that matter lying wholly in covenant may by matter *ex post facto* be converted into deceit. . . . When he becomes of counsel for another, that is a deceit, and changes all that was before only covenant, for which deceit he shall have an action on his case." \*

The act of the defendant did not affect, it is true, the person or physical property of the plaintiff. Still, it was hardly an extension of the familiar principle of misfeasance to regard the betrayal of the plaintiff's secrets as a tortious invasion of his rights. But the judges encountered a real difficulty in applying that principle to a case that came before the Exchequer Chamber a few years later.† It was a bill of deceit in the King's Bench, the plaintiff counting that he bargained with the defendant to buy of him certain land for

pl. 47; Y. B. 20 H. VI. 34, pl. 4; Y. B. 22 H. VI. 43, pl. 28), [as did Prisot, C.J., in Y. B. 37 H. VI. 8-18], that one who bargained to sell land for a certain sum to be paid might have debt for the money, and, therefore, on the principle of reciprocity, was liable in an action on the case to his debtor. But this view must be regarded as an idiosyncrasy of these judges, for their premise was plainly false. There was no *quid pro quo* to create a debt. [See Y. B. 20 H. VI. 35-4.]

\* Y. B. 11 H. VI. 18, pl. 10, 24, pl. 1, 55, pl. 26. See also Y. B. 20 H. VI. 25, pl. 11.

† Y. B. 20 H. VI. 34, pl. 4.



\$100 in hand paid, but that the defendant had enfeoffed another of the land, and so deceived him. The promise not being binding of itself, how could the enfeoffment of a stranger be a tortious infringement of any right of the plaintiff? What was the distinction, it was urged, between this case and those of pure nonfeasance, in which confessedly there was no remedy? So far as the plaintiff was concerned, as Ayscoghe, J., said, "it was all one case whether the defendant made a feoffment to a stranger or kept the land in his own hands." He and Fortescue, J., accordingly thought the count bad. A majority of the judges, however, were in favour of the action. But the case was adjourned. Thirty-five years later (1476), the validity of the action in a similar case was impliedly recognized.\* In 1487 Townsend, J., and Brian, C.J., agreed that a traverse of the feoffment to the stranger was a good traverse, since "that was the effect of the action, for otherwise the action could not be maintained."† In the following year,‡ the language of Brian, C.J., is most explicit: "If there be an accord between you and me that you shall make me an estate of certain land, and you enfeoff another, shall I not have an action on my case? *Quasi diceret sic. Et Curia cum illo.* For when he undertook to make the feoffment, and conveyed to another, this is a great misfeasance."

In the Exchequer Chamber case, and in the case following, in 1476, the purchase-money was paid at the time of the bargain. Whether the same was true of the two cases in the time of Henry VII., the reports do not disclose. It is possible, but by no means clear, that a payment contemporaneous with the promise was not at that time deemed essential. Be that as it may, if money was in fact paid for a promise to convey land, the breach of the promise by a conveyance to a stranger was certainly, as already seen, an

\* Y. B. 16 Ed. IV. 9, pl. 7.

† Y. B. 2 H. VII. 12, pl. 15.

‡ Y. B. 3 H. VII. 14, pl. 20.

actionable deceit by the time of Henry VII. This being so, it must, in the nature of things, be only a question of time when the breach of such a promise, by making no conveyance at all, would also be a cause of action. The mischief to the plaintiff was identical in both cases. The distinction between misfeasance and nonfeasance, in the case of promises given for money, was altogether too shadowy to be maintained. It was formally abandoned in 1504, as appears from the following extract from the opinion of Frowyk, C.J.: "And so, if I sell you ten acres of land, parcel of my manor, and then make a feoffment of my manor, you shall have an action on the case against me, because I received your money, and in that case you have no other remedy against me. And so, if I sell you my land and covenant to enfeof you and do not, you shall have a good action on the case, and this is adjudged. . . . And if I covenant with a carpenter to build a house and pay him £20 for the house to be built by a certain day, now I shall have a good action on my case because of payment of money, and still it sounds only in covenant and without payment of money in this case no remedy, and still if he builds it and misbuilds, action on the case lies. And also for nonfeasance, if money paid case lies." \*

The gist of the action being the deceit in breaking a promise on the faith of which the plaintiff had been induced to part with his money or other property, it was obviously immaterial whether the promisor or a third person got the benefit of what the plaintiff gave up. It was accordingly decided, in 1520, that one who sold goods to a third person on the faith of the defendant's promise that the price should be

\* Keilw. 70, pl. 25, which seems to be the same case as Y. B. 20 H. VII. 8, pl. 18; Y. B. 21 H. VII. 41, pl. 66, per Fineux, C.J., *accord*. See also Brooke's allusion to an "action on the case upon an *assumpsit pro tali summa*." Br. Ab. Disceit, pl. 29. [In 1455 there was an action on the case for a nonfeasance against a defendant who "*assumpsit super se pro certa pecuniat summa*," but "*machinans, etc., made no enrolment*." Y. B. 34 H. VI. 4, pl. 12.]

paid, might have an action on the case upon the promise.<sup>1</sup> This decision introduced the whole law of parol guaranty. Cases in which the plaintiff gave his time or labour were as much within the principle of the new action as those in which he parted with property. And this fact was speedily recognized. In Saint-Germain's book, published in 1522, the student of law thus defines the liability of a promisor: "If he to whom the promise is made have a charge by reason of the promise, . . . he shall have an action for that thing that ~~was~~ promised, though he that made the promise have no worldly profit by it."† From that day to this a detriment has always been deemed a valid consideration for a promise if incurred at the promisor's request.‡

Jealousy of the growing jurisdiction of the chancellors was doubtless a potent influence in bringing the common-law judges to the point of allowing the action of assumpsit. Fairfax, J., in 1481, advised pleaders to pay more attention to actions on the case, and thereby diminish the resort to Chancery; § and Fineux, C.J., remarked, after that advice had been followed and sanctioned by the courts, that it was no longer necessary to sue a *subpœna* in such cases.||

That equity gave relief, before 1500, to a plaintiff who had

\* Y. B. 12 H. VIII. 11, pl. 3.

† Doct. and Stud. Dial. II. c. 24.

‡ Y. B. 27 H. VIII. 24, pl. 3 [Pecke v. Redman (1555), Dy, 113, the earliest reported case of assumpsit upon mutual promises]; Webb's Case (1578), 4 Leon, 110; Richards v. Bartlett (1584), 1 Leon. 19; Baxter v. Read (1585), 3 Dyer. 272, b, note; Foster v. Scarlett (1588), Cro. El. 70; Sturlyn v. Albany (1588), Cro. El. 57; Greenleaf v. Barker (1590), Cro. El. 193; Knight v. Rushworth (1596), Cro. El. 469; Bane's Case (1611), 9 Rep. 93, b. These authorities disprove the remark of Mr. Justice Holmes (*Common Law*, 287) that "the law oscillated for a time in the direction of reward, as the true essence of consideration." In the cases cited in support of that remark, the argument turned upon the point of benefit, as the only arguable point. The idea that the plaintiff in those cases had, in fact, incurred a detriment would have seemed preposterous. Professor Langdell's observations (*Summary of Contract*, § 64) are open to similar criticism.

§ Y. B. 21 Ed. IV. 23, pl. 6.

|| Y. B. 21 H. VII. 41, pl. 66.

incurred detriment on the faith of the defendant's promise, is reasonably clear, although there are but three reported cases.\* In one of them, between 1377 and 1399, the defendant promised to convey certain land to the plaintiff, who, trusting in the promise, paid out money in travelling to London and consulting counsel; and upon the defendant's refusal to convey prayed for a subpœna to compel the defendant to answer of his "deceit."† The bill sounds in tort rather than in contract, and inasmuch as even *cestuis que use* could not compel a conveyance by their feoffees to use at this time, its object was doubtless not specific performance, but reimbursement for the expenses incurred. *Appilgarth v. Sergeantson*‡ (1438) was also a bill for *restitutio in integrum*, savoring strongly of tort. It was brought against a defendant who had obtained the plaintiff's money by promising to marry her, and had then married another in "*grete* deceit."§ The remaining case, thirty years later,|| does not differ materially from the other two. The defendant, having induced the plaintiff to become the procurator of his benefice, by a promise to save him harmless for the occupancy, secretly resigned his benefice, and the plaintiff, being afterwards vexed for the occupancy, obtained relief by subpœna.

Both in equity ¶ and at law, therefore, a remediable breach

[Two other cases are given by Mr. S. R. Bird, in the *Antiquary*, vol. iv. 185; vol. v. p. 38. See 8 Harv. L. Rev. 256.]

† 2 Cal. Ch. II.

‡ 1 Cal. Ch. XLI.

§ An action on the case was allowed under similar circumstances in 1505, *Anon.*, Cro. El. 79 (cited).

|| Y. B. 8 Ed. IV. 4, pl. 11.

¶ The Chancellor (Stillington) says, it is true, that a subpœna will lie against a carpenter for breach of his promise to build. But neither this remark, nor the statement in Diversity of Courts, Chancery, justifies a belief that equity ever enforced gratuitous parol promises [8 Harv. L. Rev. 255-258]. But see Holmes, 1 L. Q. Rev. 172, 173; Salmond, 3 L. Q. Rev. 173. The practice of decreeing specific performance of any promises can hardly be much older than the middle of the sixteenth century. Bro. Ab. Act. on Case, pl. 72 [Specific Performance of Contracts, *Green Bag*, vol. i. p. 26]. The invalidity of a *nudum pactum* was clearly stated by Saint-Germain in 1522. Doct. & St. Dial. II. Ch. 22, 23, and

of a parol promise was originally conceived of as a deceit ; that is, a tort. Assumpsit was in several instances distinguished from contract.\* By a natural transition, however, actions upon parol promises came to be regarded as actions *ex contractu*.† Damages were soon assessed, not upon the theory of reimbursement for the loss of the thing given for the promise, but upon the principle of compensation for the failure to obtain the thing promised. Again, the liability for a tort ended with the life of the wrong-doer. But after the struggle of a century, it was finally decided that the personal representatives of a deceased person were as fully liable for his assumpsits as for his covenants.‡ Assumpsit, however, long retained certain traces of its delictual origin. The plea of not guilty was good after verdict, "because there is a deceit alleged." § Chief Baron Gilbert explains the comprehensive scope of the general issue in assumpsit by the fact that "the gist of the action is the fraud and delusion that the defendant hath offered the plaintiff in not performing the promise he had made, and on relying on which the plaintiff is hurt." || This allegation of deceit, in the familiar form : "Yet the said C. D., not regarding his said promise, but contriving and fraudulently intending, craftily and subtly, to deceive and defraud the plaintiff," etc.,¶ which persisted to the present

24. [See similar statements in a little treatise concerning writs of subpoena, Doct. & St. (18 ed.) Appendix, 17, Harg., 1. Tr., 334, which was written shortly after 1523.]

\* Y. B. 27 H. VIII. 24, 25, pl. 3; *Sidenham v. Worlington*, 2 Leon. 224; *Banks v. Thwaites*, 3 Leon. 73; *Shandois v. Simpson*, Cro. El. 880; *Sands v. Trevilian*, Cro. Car. 107. [Doct. & St. Dial. II. ch. 23 and 24; *Bret v. J. S.*, Cro. El. 756; *Milles v. Milles*, Cro. Car. 241; *Jordan v. Tomkins*, 6 Mod. 77. Contract originally meant what we now call a real contract, that is, a contract arising from the receipt of a *quid pro quo*, in other words, a debt. See 8 Harv. L. Rev. 253 n. 3.]

† *Williams v. Hide*, Palm. 548, 549; *Wirral v. Brand*, 1 Lev. 165.

‡ *Legate v. Pinchion*, 9 Rep. 86; *Sanders v. Esterby*, Cro. Jac. 417.

§ *Corby v. Brown*, Cro. El. 470; *Elrington v. Doshant*, 1 Lev. 142.

|| *Common Pleas*, 53.

¶ In Impey's King's Bench (5 ed.) 486, the pleader is directed to omit these

century, is an unmistakable mark of the genealogy of the action. Finally, the consideration must move from the plaintiff to-day, because only he who had incurred detriment upon the faith of the defendant's promise, could maintain the action on the case for deceit in the time of Henry VII.

The view here advanced as to the origin of special assumpsit, although reached by an independent process, accords with, it will be seen, and confirms, it is hoped, the theory first advanced by Judge Hare.

The origin of *indebitatus assumpsit* may be explained in a few words: Slade's case,\* decided in 1603, is commonly thought to be the source of this action.† But this is a misapprehension. *Indebitatus assumpsit* upon an express promise is at least sixty years older than Slade's case.‡ The evidence of its existence throughout the last half of the sixteenth century is conclusive. There is a note by Brooke, who died in 1558, as follows: "Where one is indebted to me, and he promises to pay before Michaelmas, I may have an action of debt on the contract, or an action on the case on the promise."§ In *Manwood v. Burston*|| (1588), Manwood, C. B., speaks of "three manners of considerations upon which an assumpsit may be grounded: (1) A debt precedent, (2) where he to whom such a promise is made is damnified by doing anything, or spends his labour at the instance of the promisor, although no benefit comes to the promisor . . . or there is a present consideration."¶

words in declaring against a Peer: "For the Lords have adjudged it a very high contempt and misdemeanor, in any person, to charge them with any species of fraud or deceit."

\* 4 Rep. 92 a; Yelv. 21; Moore, 433, 667.

† Langdell, Cont. § 48; Pollock, Cont. (4 ed.) 144; Hare, Cont. 136, 137; Salmond, 3 L. Q. Rev. 179.

‡ Br. Ab. Act. on Case, pl. 105 (1542).

§ Br. Ab. Act. on Case, pl. 5.

|| 2 Leon. 203, 204.

¶ See further, Anon. (B. R. 1572), Dal. 84, pl. 35; Pulmant's case (C. B. 1585), 4 Leon. 2; Anon. (C. B. 1587), Godb. 98, pl. 12; *Gill v. Harwood*

The Queen's Bench went even further. In that court proof of a simple contract debt, without an express promise, would support an *indebitatus assumpsit*.<sup>\*</sup> The other courts, for many years, resisted this doctrine. Judgments against a debtor in the Queen's Bench upon an implied assumpsit were several times reversed in the Exchequer Chamber.<sup>†</sup> But the Queen's Bench refused to be bound by these reversals, and it is the final triumph of that court that is signalized by Slade's case, in which the jury found that "there was no other promise or assumption, but only the said bargain;" and yet all the judges of England resolved "that every contract executory implied an assumpsit."

*Indebitatus assumpsit*, unlike special assumpsit, did not create a new substantive right; it was primarily only a new form of procedure, whose introduction was facilitated by the same circumstances which had already made Case concurrent with Detinue. But as an express assumpsit was requisite to charge the bailee, so it was for a long time indispensable to charge a debtor. The basis or cause of the action was, of course, the same as the basis of debt, *i.e. quid pro quo*, or benefit. This may explain the inveterate practice of defining consideration as either a detriment to the plaintiff or a benefit to the defendant.

Promises not being binding of themselves, but only because of the detriment or the debt for which they were given, a need was naturally felt for a single word to express the additional and essential requisite of all parol contracts. No word was so apt for the purpose as the word "consideration." Soon after the reign of Henry VIII., if not earlier, it became the practice,

(C. B. 1587), 1 Leon. 61. It was even decided that assumpsit would lie upon a subsequent promise to pay a precedent debt due by covenant. *Ashbrook v. Snape* (B. R. 1591), Cro. El. 240. But this decision was not followed.

<sup>\*</sup> *Edwards v. Burr* (1573), Dal. 108; Anon. (1583), Godb. 13; *Estrigge v. Owles* (1589), 3 Leon. 200.

<sup>†</sup> *Hinson v. Burrigge*, Moore, 701; *Turges v. Beecher*, Moore, 694; *Parmour v. Payne*, Moore, 703; *Maylard v. Kester*, Moore, 711.

in pleading, to lay all assumpsits as made *in consideration* of the detriment or debt.\* And these words became the peculiar mark of the technical action of *assumpsit*, as distinguished from other actions on the case against surgeons or carpenters, bailees and warranting vendors, in which, as we have seen, it was still customary to allege an undertaking by the defendant.

It follows, from what has been written, that the theory that consideration is a "modification of *quid pro quo*," is not tenable. On the one hand, the consideration of *indebitatus assumpsit* was identical with *quid pro quo*, and not a modification of it. On the other hand, the consideration of detriment was developed in a field of the law remote from debt; and, in view of the sharp contrast that has always been drawn between special assumpsit and debt, it is impossible to believe that the basis of the one action was evolved from that of the other.†

Nor can that other theory be admitted by which consideration was borrowed from equity, as a modification of the Roman "*causa*." The word "consideration" was doubtless first used in equity; but without any technical significance before the sixteenth century.‡ Consideration in its essence, however, whether in the form of detriment or debt, is a common-law growth. Uses arising upon a bargain or

\* In *Joscelin v. Sheldon* (1557), 3 Leon. 4, Moore, 13, Ben. & Dal. 57, pl. 53, s. c., a promise is described as made "in consideration of," etc. An examination of the original records might disclose an earlier use of these technical words in connection with an assumpsit. But it is a noteworthy fact, that in the reports of the half-dozen cases of the reign of Henry VIII. and Edward VI. the word "consideration" does not appear. [In *Whorwood v. Gibbons* (1577), Goldsb. 48, 1 Leon. 61, s. c., it was said by the court to be "a common course in actions upon the case against him, by whom the debt is due, to declare without any words *in consideration*."]

† See also Mr. Salmon's criticism of this theory, in 3 L. Q. Rev. 178.

‡ 31 H. VI. Fitz. Ab. Subp. pl. 23; *Fowler v. Iwardby*, 1 Cal. Ch. LXVIII.; *Pole v. Richard*, 1 Cal. Ch. LXXXVIII.; Y. B. 20 H. VII. 10, pl. 20; Br. Feff. al use, pl. 40; Benl. & Dal. 16, pl. 20.



covenant were of too late introduction to have any influence upon the law of assumpsit. Two out of three judges questioned their validity in 1505, a year after assumpsit was definitely established.\* But we may go further. Not only was the consideration of the common-law action of assumpsit not borrowed from equity, but, on the contrary, the consideration which gave validity to parol uses by bargain and agreement, was borrowed from the common law. The bargain and sale of a use, as well as the agreement to stand seised, were not executory contracts, but conveyances. No action at law could ever be brought against a bargainor or covenantor.† The absolute owner of land was conceived of as having in himself two distinct things, the seisin and the use. As he might make livery of seisin and retain the use, so he was permitted, at last, to grant away the use and keep the seisin. The grant of the use was furthermore assimilated to the grant of a chattel or money. A *quid pro quo*, or a deed, being essential to the transfer of a chattel or the grant of a debt,‡ it was required also in the grant of a use.§ Equity might, conceivably, have enforced uses wherever the grant was by deed. But the chancellors declined to carry the innovation so far as

\* V. B. 21 VII. 18, pl. 30. The consideration of blood was not sufficient to create a use, until the decision, in 1505, of *Sharrington v. Strotton*, Plow. 295. [In 1533 Hales said, "A man cannot change a use by a covenant which is executed before, as to covenant to be seised to the use of H. S. because that H. S. is his Cosin; or because that H. S. before gave to him twenty pound, except the twenty pound was given to have the same Land. But otherwise of a consideration, present or future, for the same purpose, as for one hundred pounds paid for the Land *tempore conventionis*, or to be paid at a future day, or for to marry his daughter, or the like." Bro. Ab. Feff. al use, 54.]

† Plow. 298, 308; *Buckley v. Simonds*, Winch. 35-37, 59, 61; *Hore v. Dix*. 1 Sid. 25, 27; *Pybus v. Milford*, 2 Lev. 75, 77.

‡ That a debt, as suggested by Professor Langdell (*Contracts*, § 100), was regarded as a grant, finds strong confirmation in the fact that Debt was the exclusive remedy upon a covenant to pay money down to a late period, *Chawner v. Bowers*, Godb. 217. See also 1 Roll. Ab. 518, pl. 2 and 3; *Brown v. Hancock*, Hetl. 110, 111, *per Barkley*.

§ Bacon, St. of Uses (Rowe's ed.), 13-14.

this. They enforced only those gratuitous covenants which tended to "the establishment of the house" of the covenantor; in other words, covenants made in consideration of blood or marriage.\*

JAMES BARR AMES.

(*To be continued.*)

## II.—NOTES ON THE EARLY HISTORY OF LEGAL STUDIES IN ENGLAND.†

(*Continued from page 59.*)

IT was natural that students desiring to acquire the "learning and skill" required to qualify them for admission to the profession of the law, should gather together in the neighbourhood of the Courts at Westminster. There were provided for their reception and training—when first or how we do not know—certain hostels or inns which came to be known as the Inns of Chancery and Inns of Court. We find in the reign of Edward III. an interesting reference made to them as existing institutions by Sir Richard de Willoughby, one of the justices

\* ["If the bargain was for the sale of land and there was no livery of seisin the buyer had no common-law remedy for the recovery of the land, like that of Detinue for chattels. Equity, however, near the beginning of the sixteenth century, supplied the common-law defect by compelling the seller to hold the land to the use of the buyer, if the latter had either paid or agreed to pay the purchase money. *Br. Ab. Feoff. at Use*, 54; *Barker v. Keate*, 1 Freem. 249, 2 Mod. 249, s. c.; Gilbert, *Uses*, 52; 2 Sand. *Uses*, 57. The consideration essential to give the buyer the use of land was, therefore, identical with the *quid pro quo* which enabled him to maintain Detinue for a chattel. Inasmuch as the consideration for parol uses was thus clearly borrowed from the common-law doctrine of *quid pro quo*, it seems in the highest degree improbable that the consideration for an *Assumpsit* was borrowed by the Common Law from Equity." From the writer's *Essay on Parol Contracts, prior to Assumpsit*, 8 Harv. L. Rev. 259.]

† A paper read by Joseph Walton, Esq., Q.C., before the American Bar Association, at Buffalo, N.Y., August 29th, 1899, revised and amplified.

of the Common Pleas who, to an exception taken in a case before him, answered, "that the same was no exception in that Court, although they had often heard the same for an exception amongst the apprentices in hostells or inns." He was no doubt referring to the "moots" or "bolts" held at the Inns of Chancery and Inns of Court at which imaginary cases were set for the training of the students and younger barristers in the argument of points of law. The Inns of Chancery appear to have been intended for clerks, and as preparatory schools for students who were seeking admission to the Inns of Court. Sir John Fortescue, Chief Justice of the King's Bench whilst in exile in the Duchy of Berrie with Queen Margaret and Edward Prince of Wales, only son of King Henry VI., wrote his treatise *De Laudibus Legum Angliæ*. It is in the form of a dialogue between himself and the young Prince, in the course of which the Prince asks, "Why the laws of England, being so good, so fruitfull, and so commodious, are not taught in the Universities, as the Civill and Canon lawes are." The Chief Justice replies that, "In the Universities of England sciences are not taught but in the Latin tongue: and the lawes of that land are to be learned in three several tongues: to witte, in the English tongue, the French tongue, and the Latin tongue." He explains parenthetically that "the common speech, now used in France, agreeth not, nor is not like, the French used among the lawyers of England, but it is by a certaine rudenesse of the common people corrupt. Which corruption of speech chanceth not in the French that is used in England. . . . Wherefore (he continues) while the lawes of England are learned in these three tongues, they cannot conveniently bee taught or studied in the Universities, where only the Latin tongue is exercised. Notwithstanding, the same Lawes are taught and learned, in a certaine place of publike or common studie, more convenient and apt for attayning to the knowledge of them than any other University. For this place of

studie is situate nie to the King's Courts, where the same lawes are pleaded and argued, and judgments by the same given by Judges, men of gravitie, ancient in yeares, perfit and graduate in the same lawes. Wherefore, every day in Court, the students in those Lawes resort by great numbers into those Courts wherein the same Lawes are read and taught as it were in common scholes. This place of studie is set between the place of the said Courtes and the Citie of London, which of all things necessarie is the plentifullest of all the cities and townes of the realme. So that the said place of studie is not situate within the cittie where the confluence of people might disturbe the quietnes of the students, but somewhat severall in the suburbes of the same cittie, and nigher to the Courts, that the students may dayelye at their pleasure have accesse and recourse thither without wearinesse."

The Chief Justice then procceds to describe this place of study in more detail, and says, that there "Bee in it tenne lesser houses or innes, and sometimes more, which are called Innes of the Chancerie. And to every one of them belongeth an hundred students at the least, and to some of them a much greater number, though they be not ever altogether in the same. These students, for the most part of them, are young men, learning or studying the *originals*, and as it were the elements of the Lawe, who profiting therein, as they grow to ripenesse, so are they admitted into the greater Innes of the same studie, called the *Innes of Court*. Of the which greater Inns there are foure in number. And to the least of them belongeth, in forme above mentioned, two hundred studentes, or there aboutes. For in these greater innes, there canne no student bee mayntayned for lesse expenses by the yeare, than twenty Markes, and if he have a servant to waite upon him, as most of them have, then so much the greater will his charges be. Nowe, by reason of this charges, the children onely of noblemen doe studie the lawes in those Innes. For the poore and common sort of the people, are not able to

bear so great charges for the exhibition of their children. And marchaunt men can seldome finde in their hearts to hinder their marchandise with so great yearly expenses." . . . "And, to speake uprightly, there is," he continues, "in these greater Inns, yea, and in the lesser to, beside the study of the laws, as it were an University or schoole of all commendable qualities requisite for Noblemen. There they learn to sing and to exercise themselves in all kinde of harmony. There also they practise dauncing and other Noblemen's pastimes, as they use to doe which are brought up in the King's house: On the working daies, most of them apply themselves to the studie of the Lawe. And on the holy daies to the studie of *Holy Scripture*; and out of the time of Divine service, to the reading of *Cronicles*." \*

I find that Fortescue had been a "governor" of Lincoln's Inn in 1424, 1425, and 1428, and Pensioner in 1429. The Inns were, as he says, placed in the suburbs out of the noise and turmoil of the city. The old buildings of several of the Inns of Chancery still stand, but it is a very long time since the Inns of Chancery pretended to give any attention to the care or training of law students. The quaint courts and halls and chapels, and the pleasant gardens of the Inns of Court, remain where they were when Fortescue wrote, no longer suburban, but still strangely quiet as we pass into them from the din of the city, and though much of their old collegiate spirit and tradition has disappeared, in constitution they have undergone singularly little change. The Benchers are still, as of old, the governing body of the Inn. No man can practise at the English Bar unless he has been admitted a student at one of the Inns of Court, and after keeping twelve terms as a student has been called to the Bar by resolution of the Benchers of his Inn. A term is now kept by eating a certain number of dinners in Hall. This is one of the few traces left of the collegiate life of the old days when students and

\* Fortescue, *London*, 1616; pp. 110-115.

barristers not only dined but lived together in their Inn, and no new member was admitted unless he could be provided with a chamber, or, to speak more accurately, with at least half a chamber within the Inn.

What strikes one most in reading the recently published records of the Inns of Court during the fifteenth and sixteenth centuries, is the great activity of corporate life which they display. The education of the students was not left in the hands of salaried teachers, but the Benchers and the Bar alike co-operated in the work. A reader appointed by the Benchers from amongst themselves at each Inn of Court, gave a course of readings or lectures twice a year on some statute. Sir Thomas Lyttelton read at the Inner Temple on the statute *De donis Conditionalibus*. He afterwards became a judge of the Common Pleas, and wrote the famous treatise on Tenures, upon which Coke wrote the still more famous Commentary. Lyttelton died in 1481. Coke himself was a reader at the Inner Temple, and chose for his subject the Statute of Uses, and it was on this same statute that Coke's great rival, Bacon, read at Gray's Inn. This reading is to be found among his published works. The education of students at the lesser Inns, the Inns of Chancery, was also undertaken by barristers of the Inns of Court. Coke, for instance, who had been a student at an Inn of Chancery before he was admitted to the Inner Temple, was sent, very soon after his call to the Bar, to read at Lyon's Inn. Then there were the Moots and Bolts, meetings after supper, at which fictitious cases were argued before the Benchers, at the Moots by newly called barristers, and at the Bolts probably by students. All members of the Inn, or, to use the formal title, all fellows of the "Honourable Society," were bound by the obligations of fellowship to assist in maintaining a healthy and well-ordered common life amongst their fellow members, young and old, and to take their part actively and personally in the work of education.

After the dissolution of the monasteries by Henry VIII. it was at one time proposed to apply some portion of the proceeds to the erection of a great school of law. The design was not carried out, but by the King's command a scheme was prepared by Nicholas Bacon, Thomas Denton, and Robert Cary. In presenting to the King the articles which they had formulated for the constitution and government of the proposed College, they describe it as "an House of Students wherein the knowledge as well of the pure French and Latin tongues as of Your Grace's Lawes of this Your Realm should be attained, whereby Your Grace hereafter might be the better served of Your Graces own students of the law as well in foreign Countries as within this Your Grace's Realm." The articles contain much that is interesting, but scarcely within the scope of this paper. They are founded to a large extent upon the model of the Inns of Court, and with a view to their preparation Nicholas Bacon and his two associates had been directed by the King to inquire and report as to the constitution of the Inns of Court and the "best form and order of Study practised therein." And, as they say, after diligent search and reading of all the Orders of the Houses of Court they did compendiously set forth "the most universal and general things concerning the Orders and Exercises of learning in the houses of Court," which they "thought meet to describe and to present into Your Grace's hands."

This report gives the fullest and clearest account of the methods of teaching and training at the Inns of Court and Chancery at a time when the ancient system was in its prime that I have been able to discover ; and for this reason I may perhaps be excused for citing it at length, Nicholas Bacon was able to speak of the regulations of the Inns of Court not merely from diligent search and reading of orders, but also from personal experience, as he was called to the Bar at Gray's Inn in 1533, was made an ancient in 1536, and a

bencher in 1550. The Report, which, omitting only the introductory address to the King and some details as to the wages and gratuities of servants, is set out below, was probably not made before 1540.

*The Manner of the Fellowship and their ordinary Charges, besides their Commons.*

First it is to be considered that none of the four houses of Courts have any Corporation, whereby they are enabled to purchase, receive or take lands or tenements or any other revenue, nor have anything towards the maintenance of the house, saving that every one that is admitted fellow, after that he is called to the Masters' Commons payeth yearly 3 shillings 4 pence, which they call the pension mony, and in some houses, every man for his admittance payeth 20 pence and also besides that yearly for his Chamber 3 shillings 4. all which money is the only thing they have towards the reparations and rent of their house, and the wages of their officers.

*That what sorts and degrees the whole Fellowship and Company of Students of the law is amongst them divided.*

The whole company and fellowship of Learners, is divided and sorted into three parts and degrees ; that is to say into Benchers, or as they call them in some of the houses, Readers, Utter-Barresters, and Inner-Barresters.

*Benchers.*

Benchers, or Readers, are called such as before-time have openly read, which form and kinde of reading shall hereafter be declared, and to them is chiefly committed the government and ordering of the house, as to men meetest, both for their age, discretion and wisdomes, and of these is one yearly chosen, which is called the Treasurer, or in some house



Pensioner, who receiveth yearly the said pension money, and therewith dischargeth such charges as above written, and of the receipt and payment of the same is yearly accountable.

*Utter-Barresters.*

Utter-Barresters are such, that for their learning and continuance, are called by the said Readers to plead and argue in the said house, doubtful Cases and Questions, which amongst them are called Motes, at certain times propounded, and brought in before the said Benchers, as Readers, and are called Utter-Barresters, for that they, when they argue the said Motes, they sit uttermost on the formes, which they call the Barr, and this degree is the chieftest degree for learners in the house next the Benchers; for of these be chosen and made the Readers of all the Inns of Chancery, and also of the most ancient of these is one elected yearly to read amongst them, who after his reading, is called a Bercher, or Reader.

*Inner-Barresters.*

All the residue of learners are called Inner-Barresters, which are the youngest men, that for lack of learning and continuance, are not able to argue and reason in these Motes, nevertheless whensoever any of the said Motes be brought in before any of the said Benchers, then two of the said Inner-Barresters sitting on the said forme with the Utter-Barresters, doe for their exercises recite by heart the pleading of the same Mote-Case, in Law-French, which pleading is the declaration at large of the said Mote-Case, the one of them taking the part of the Plaintiff, and the other the part of the Defendant.

*The order and exercises of learning.*

The whole year amongst them is divided into three parts; that is to say, the learning Vacation, the Terme-times, and the meane and dead Vacation.

They have yearly two learning-Vacations, that is to say, Lent-Vacation which begins the first Munday in Lent, and continueth three weeks and three dayes, the other Vacation is called Summer-Vacation, which beginneth the Munday after Lammas day,\* and continueth as the other, in these Vacations doe the greatest conferences, and exercises of study that they have in all the year, for in them these are the Orders.

*The Exercises of learning in the Vacation. The manner of reading in the Inns of Court.*

First, The Reader and Ancients appoint the eldest Utter-Barrester in continuance, as one that they think most able for that Roome, to reade amongst them openly in the house, during the Summer-Vacation, and of this appointment he hath alway knowledge about half a year before he shall reade, that in the mean time he may provide therefore, and then the first day after Vacation, about 8 of the clock, he that is so chosen to reade openly in the Hall before all the Company, shall reade some one such Act, or Statute as shall please him to ground his whole reading on for all that Vacation, and that done, doth declare such inconveniences and mischiefs as were unprovided for, and now by the same Statute be [remedied] and then reciteth certain doubts, and questions which he hath devised, that may grow upon the said Statute, and declareth his judgement therein, that done, one of the younger Utter-Barresters rehearseth one question propounded by the Reader, and doth by way of argument labour to prove the Readers opinion to be against the Law, and after him the rest of the Utter-Barresters and Readers one after another in their ancienties, doe declare their opinions and judgements in the same, and then the Reader who did put the Case, indeavoureth himself to confute Objections laid against him, and to confirme his own opinion,

\* August 1. This Vacation is also called the Autumn Vacation, and sometimes the Harvest Vacation.

after whom, the Judges, and Serjeants, if any be present, declare their opinions, and after they have done, the youngest Utter-Barrester again rehearseth another Case, which is ordered as the other was ; thus the reading ends for that day ; and this manner of reading and disputations continue daily two houres, or thereabouts.

And besides this, daily in some houses after dinner, one at the Readers' Board, before they rise, propoundeth another of his cases to him, put the same day at his reading, which Case is debated by them all in like forme, as the Cases are used to be argued at his reading, and like order is observed at every messe, at the other Tables, and the same manner alwayes observed at supper, when they have no Motes.

### *Lent-Vacation.*

Of those that have read once in the Summer-Vacation, and be Benchers, is chosen alwayes one to reade in Lent, who observeth the like forme of reading, as is before expressed in the Summer-Vacation, and of these Readers in these Vacations, for the most part are appointed those that shall be Serjeants.

### *The Ordering and Fashion of Motying.*

In these Vacations every night after supper, and every Fasting-day immediately after six of the Clock, boyer ended, (Festival-dayes and their evens onely excepted) the Reader, with two Benchers, or one at the least, cometh into the Hall to the Cuboard and there most commonly one of the Utter-Barresters propoundeth unto them some doubtful Case, the which every of the Benchers in their ancienties argue, and last of all he that moved ; this done, the Readers and Benchers sit down on the bench in the end of the Hall, whereof they take their name, and on a forme toward the midst of the Hall sitteth down two Inner-Barresters, and of

the other side of them on the same forme, two Utter-Barresters ; and the Inner-Barresters doe in French openly declare unto the Benchers (even as the Serjeants doe at the barr in the King's Courts, to the Judges) some kinde of Action, the one being as it were retained with the Plaintiff in the Action, and the other with the Defendant, after which things done, the Utter-Barresters argue such questions as be disputable within the Case (as there must be alwayes one at the least) and this ended, the Benchers doe likewise declare their opinions, how they think the Law to be in the same questions and this manner of exercise of Moting, is daily used, during the said Vacations.

This is alwayes observed amongst them, that in all their open disputations, the youngest of continuance argueth first ; whether he be Inner-Barrester or Utter-Barrester, or Benchers, according to the forme used amongst the Judges and Serjeants.

And also that at their Motes, the Inner-Barresters and Utter-Barresters doe plead and reason in French, and the Benchers in English, and at their reading the Readers' Cases are put in English, and so argued unto.

*Exercises of Motes in the Inns of Chancery, during the Vacation.*

Also in the learning-Vacations, the Utter-Barresters which are Readers in the Inns of Chancery goe to the house whereunto they reade, Either of the said Readers taking with them two learners of the house they are of, and there meet them for the most part two of every house of Court, who sitting (as Benchers doe in Court at their Motes) hear and argue such Motes as are brought in, and pleaded by the Gentlemen of the same houses of Chancery, which be nine in number, four being in Holborn, which be read of Grayes-Inn and Lincolns-Inn, And have Motes daily, for the most part before

noon, which begin at nine of the Clock, and continue until twelve, or thereabouts, and the other five which are within Temple Bar, which are of the two Temples, have their Motes at three of the Clock in the afternoon.

*The Exercises of Learning in the Terme Time.*

The onely exercises of learning in the Terme-time, is arguing and debating of Cases after dinner, and the Moting after supper, used and kept in like forme, as is heretofore prescribed in the Vacation-time, and the Reader of the Inns of Chancery to reade three times a week, to keep Motes, during all the Terme, to which Motes, none of the other houses of Court come, as they doe in the learning vacations, but onely to come with the Reader of the same house.

*The Exercises of Learning in the Mean-Vacation.*

The whole time out of the learning Vacation and Terme, is called the Mean-Vacation, during which time, every day after dinner, Cases are argued in like manner as they be in other times, and after supper Motes are brought in and pleaded by the Inner-Barresters, before the Utter-Barresters, which sit there, and occupy the roome of Benchers, and argued by them in like forme as the Benchers doe in the Terme-time, or learning Vacation.

*The Manner of Christmas used amongst them.*

The Readers and Benchers at a Parliament or Pension held before Christmas, if it seeme unto them that there be no dangerous time of sickness, neither dearth of victuals, and that they are furnished of such a Company, as both for their number and appertaines are meet to keep a solemn Christmas, then doe they appoint and chose certain of the house to be Officers, and bear certain rules in the house during the said time, which Officers for the most part are

such as are exercised in the King's Highness house, and other Noble men, and this is done onely to the intent that they should in time to come know how to use themselves. In this Christmas time they have all manner of pastimes, as singing and dancing, and in some of the houses ordinarily they have some interlude or Tragedy played by the Gentlemen of the same house, the ground and matter whereof is devised by some of the Gentlemen of the house.

*The Manner of their Parliament or Pension.*

Every quarter, once or more, if need shall require, the Readers and Benchers cause one of the Officers to summon the whole company openly in the Hall at dinner, that such a night the Pension, or as some houses call it the Parliament,\* shall be holden, which Pension or Parliament in some houses, is nothing else but a conference and Assembly of their Benchers and Utter-Barresters onely, and in some other of the houses, it is an Assembly of Benchers, and such of the Utter-Barresters and other ancient and wise men of the house, as the Benchers have elected to them before time, and these together are named the Sage Company, and meet in a place therefore appointed, and there treat of such matters as shall seem expedient for the good ordering of the house, and the reformation of such things as seem meet to be reformed. In these are the Readers both for the Lent and the Summer-Vacation chosen; and also if the Treasurer of the house leave off his office, in this is a new chosen. And alwayes at the Parliament holden after Michaelmas, two Auditors appointed there, to hear and take the accounts for the year, of the Treasurer, and in some house, he accounts before the whole Company at the Pension, and out of these Pensions all misdemeanours and offences done by any Fellow of the house, are reformed and ordered according

\* At Lincoln's Inn it is called Council.

to the discretion of certain of the most ancient of the house, which are in Commons at the time of the offence done.\*

The picture thus drawn by Nicholas Bacon represents the Inns of Court in the middle of the sixteenth century, when their collegiate spirit had attained its most perfect and vigorous development. The life led by barristers and students during the fourteenth and fifteenth centuries, their religious observances, their methods of education, their amusements, their government, their disorders, and their discipline, are richly illustrated in the *Black Books of Lincoln's Inn* and the *Calendar of Inner Temple Records*, recently published by order of the Benchers of those Inns.† It is impossible, within the limits of this paper, to dwell upon the many topics of great interest which are suggested by a perusal of these Records. But a glance through their pages is indispensable if we wish to realize what the life of a law student was like in the fifteenth and sixteenth centuries. I propose, therefore, even at the risk of becoming tedious, to make a few extracts from the *Black Books of Lincoln's Inn*, the principle of selection being simply to take the names of certain Fellows of the Inn between 1450 and 1550, and to trace out the career of each as it is briefly recorded in the books of the Society. Many famous names occur in these Records, and amongst them no

\* This report was evidently used by Stow in his account of the Inns of Court. The two Reports made by Bacon, Cary, and Denton, are printed verbatim by Waterhouse in his *Fortescutus Illustratus*. London, 1663, pp. 539-546. He got them from Sir Thomas Witherington. Apparently the originals were formerly in the possession of W. Pierpoint (Burnet, *Hist. of Reformation*. Oxford, 1829, vol. i. p. 539), whose manuscripts were destroyed in a great fire at Thoresby about 1745 (*Notes and Queries*, 1st series, vol. xi. p. 495). For these references and other assistance I am indebted to the Librarian and assistant Librarians of Lincoln's Inn.

† *Records of Lincoln's Inn*. The Black Books, 1422 to 1660, with prefaces by I. Douglas Walker, Q.C.; *Calendar of Inner Temple Records*, edited by F. A. Inderwick, Q.C.

name more venerated than that of Sir Thomas More. Under the date Michaelmas, 49 Hen. VI., 1470, there appears the following entry :—

“Robert, Abbat of Mussenden, in the County of Buckingham, was admitted and pardoned his vacations, and was allowed to be at repasts; for these liberties he granted to the Society a ‘hoggheshed’ of red wine yearly at Christmas as long as he lived.”

“John More was admitted, and pardoned his vacations, and allowed to be at repasts, and to have a clerk in commons for 14*d.* a week, because as Butler and Steward, which offices he had long held, he had faithfully borne himself and would take no wages for the time when he filled the office of Steward. He was assigned to the chamber late Thomas Ripplynham’s.”

This entry is an interesting example of honorary admissions to the Society. The Abbot and the Butler alike are admitted as honorary Fellows, and in each case attendance at the exercises during the learning vacations is excused. The Butler and Steward thus honourably admitted to the fellowship of the House was the grandfather of Sir Thomas More. This is one of several recorded instances in which a faithful servant was rewarded by being admitted as a Fellow of the Inn. John More the younger, son of John More the Butler, and father of Sir Thomas More, became a student of the Inn at some date before 1476, in which year he was elected Master of the Revels, an office held by a student or Inner Barrister. In Michaelmas Term, 1482, he was appointed Butler for the Christmas Revels, and from this it would appear that he had then become an Utter Barrister. The date of his call to the Bench is not recorded, but it must have been before 1488, for in the Christmas vacation of that year he served as Marshal, an officer who was always a Benchet, and whose duty was to maintain order during the merry-making of Christmas-tide. In 1490 he was the Autumn Reader, and in



Michaelmas Term of that year was elected a Governor of the Society. I may note in passing that during the Christmas vacation following there was a great pestilence in London, and it was ordered by the Bench that all Fellows who ought to have kept that vacation (6 Hen. VII.) should be pardoned, but on condition that they should keep another in place of it.

Five years later, in Michaelmas Term, 1494, John More's learning and ability were recognized by his election as Lent Reader, which raised him to the dignity and imposed upon \* him the considerable labour of a "double-reader." It may be noted that by order of the Bench this same Michaelmas Term, nine barristers were put out of commons and each fined 40*s.* "for not providing and preparing for the Moot in Hall, in consequence whereof the Benchers and the rest of the Society had to do without. Ordered that in future every barrister committing the like offence shall pay a fine of 6*s.* 8*d.*"

It is on the 12th of February, 1496, that the third generation of the More family first appears on the Records of the Inn, in the person of its most illustrious member Thomas More. The entry is as follows: "Feb. 12, 1496. Thomas More was admitted Feb. 12, and pardoned four vacations at the instance of John More, his father." It appears to have been usual on the admission of a student to remit a certain number of vacations, and thus shorten the necessary period of study before call; but it must not be assumed that the student's preparation necessarily commenced on his admission to an Inn of Court. It seems clear that in very many cases—indeed, it may perhaps be said to have been the rule—the course of legal training began at one of the Inns of Chancery, from which in due course the student passed to an Inn of Court.\* Thus Thomas More was at

\* Certain Inns of Chancery were dependent on particular Inns of Court. New Inn was attached to the Middle Temple; Clement's Inn, Clifford's Inn, and Lyon's Inn to the Inner Temple; Thav's Inn and Furnival's Inn to Lincoln's Inn; Barnard's Inn and Staple Inn were attached to Gray's Inn.

New Inn before he became a Fellow of Lincoln's Inn. It must, moreover, be remembered that the course of training continued as of obligation for some years after call, and before the barrister was allowed to practice. The date of Thomas More's call does not appear, but it must have been before Michaelmas Term, 1507, when he was elected Butler for the Christmas Vacation. This office must not be confounded with that of Butler of the Inn, which had, as we have seen, been held by Thomas More's grandfather. The Butler for the Christmas revels was elected in the Michaelmas Term of each year, and was an Utter Barrister. His duty was to take charge of the wine and assist the Marshal in keeping order at Christmas-tide. It does not appear in the Records, but Foss says that More was appointed reader at Furnival's Inn, and that this appointment was renewed for three successive years. The readings at Furnival's Inn and Thavy's Inn were always provided by Utter Barristers of Lincoln's Inn, but their names are not usually recorded.

In 1510, however, More was elected to the more important office of Autumn Reader at Lincoln's Inn. By this time his father, John More, had been elevated to the rank of Sergeant-at-Law, as appears from an order which is entered in the Black Book under the date November 14, 1510. It is interesting, as illustrating the kind of duty imposed upon the Benchers in connection with the educational work of the Society. It is as follows: "Ordered by Robert Reed, Knight, Chief Justice of the King's Bench, John Boteler, a Justice of the same, John Aleyn, Baron of the Exchequer, John More, Sergeant-at-Law, John Nuport and John Nudgegate, Sergeants-at-Law elect, and the Governors and others of the Bench of Lincoln's Inn, in order to preserve and continue the learning within the Inn as hitherto, that every one called to the Bench shall keep all vacations at Autumn and Lent from the time of his call until his first Reading, under a penalty of 20s. for each vacation not kept; after his

first Reading, he shall keep five vacations during the next three years, under a penalty of 5 marks for each vacation not kept." It appears from this and other entries in the Records that at this time, Benchers who had been promoted to the rank of Sergeant-at-Law and to the Judicial Bench, continued, nevertheless, to take part in the government of the Inn. Returning to the story of Thomas More, we find that he, like his father, served as a "double-reader," having been elected, on the Feast of All Saints, 6 Hen. VIII., 1514, Lent Reader for the following year. His father, John More, was made a Judge of the Court of Common Pleas a year or two later. Thomas More published his *Utopia* about 1516, and his story passes from Lincoln's Inn and its domestic annals into a larger, sterner, and more pitiless world and takes its place in the history of England. Let me pause to point out again the one striking fact which we gather from these Records, how the traditions of the common law, the old learning and the new, were handed down, at these great societies of the English Bar, from generation to generation by the gratuitous labour of the best men of their time. We have now reached the second decade of the sixteenth century; and to carry on our rapid survey of the Black Books to the time when Nicholas Bacon published his report I have looked for a name more obscure than that of Thomas More, and for that reason, perhaps, more representative; and by mere chance I have taken one Robert Townsend (the spelling varies from year to year), of whom I suppose nothing is known, save what is set down in the Records of Lincoln's Inn. The first entry in which his name occurs is on All Saints' Day, 10 Hen. VIII., 1518, and is as follows:—

"Ordered that every Utter Barrister who is called or shall hereafter be called to the Bar in Lincoln's Inn shall keep four vacations next after his call, namely, two Lents and two Autumns, to maintain the learning there, under a penalty of 10s. for each vacation not kept.

"Fines for playing at cards and dice in chambers.

"The parson; he shall provide a wax taper of 1 lb. weight before the image of the Holy and Blessed Mary the Virgin.

"Townesend and four others, 40*d.* each.

"Bygham, 6*s.* 8*d.*, because they played in his chamber.

"Holmeley, 6*s.* 8*d.*, because he is the senior Barrister.

"They are all put out of commons until payment."

The next entry is even less to the credit of "Master Tounesend"—

"*Autumn Vacation*, 1520.

"The following gentlemen were amerced for a doe [*dama*] seized and taken away at the Gate of Lincoln's Inn from a certain poor man who was coming to speak with Danastre, and who left his horse standing at the gate bearing the said doe: Master Curzon, 3*s.* 4*d.*; Master Tounesend, 20*d.*; Master Burgh, 3*s.* 4*d.*; Master Lane, 20*d.*; Master Smyth, 20*d.*; Master See, 20*d.*; Master Menell, 20*d.*; Master Talbot, 20*d.* Of these sums 14*s.* was given to Master Sulyard for the building of the new Gate; the rest was given to the poor man in satisfaction for his doe."

The editor of the *Records* has added up the figures, and points out that the fines amount to 16*s.* 8*d.*, and that the "poor man" received only 2*s.* 8*d.*

Master Tounesend, however, was called to the Bar, and in 1525 we find Townesende and Meynell acting as Auditors. At a Council held on St. Scholastica's Day, 1527, "the following Utter Barristers were put out of commons and fined 3*s.* 4*d.* each for losing a moot on Thursday last: Talbot, Towneshend, See, Meynell, Heythe, Hygham, Davy, and Layne." On All Saints' Day of the same year Touneshend is elected to the office of Pensioner, whose duty it was to collect the pensions payable to the Society. And in 1530 Mr. Townsend was called to the Bench.

That Mr. Tounesend was a gentleman in whom considerable confidence was reposed (notwithstanding the hopeless uncertainty as to the spelling of his name), appears from a curious entry on All Saints' Day, 1531, when it was moved that whereas there was a variance between Mr. Ruston and Maycote concerning the amending of a record in the King's Bench, without the assent of the same Mr. Ruston, the hearing thereof was committed to Mr. Crafford and Mr. Tounesend, and they were directed to make their report at the next Council. Mr. Crafford was a Governor of the Inn and the Lent Reader for 1532. Their report does not appear. In 1533 Mr. Townesend was the Autumn Reader; in 1534 he was appointed a Governor of the Inn and Keeper of the Black Book, and in 1536 he was elected Treasurer. When his accounts were passed in 1537, it appears that the receipts amounted to £39 14s. 11½d., and included 3s. 4d. each from 6 Utter Barristers, and 1s. 8d. each from 15 Inner Barristers for losing a moot. The expenditure allowed amounted to £12 5s. 8d., and the balance recorded is £26 9s. 3½d., which, as the accurate Editor observes, is arithmetically wrong, as it should be £27 9s. 3½d. Finally, in 1540, Mr. Townssende is elevated to the dignity of Sergeant-at-Law, and at a Council held on St. John the Baptist's Day of that year, it was ordered that "Every of the Felowship of this Howsse shulde mete and gyffe attendance in the Hall the same daye that the Serjauntz shuld be brought to Seynt Johnz (the Priory of St. John at Clerkenwell), betwyxt the owers of three and fower of the clock att after noone the same daye, to awayte uppon thether, and the moost auncient alwayes then for the tyme beyng to make a solempne proposition unto the seid Serjauntz, and then to delyuer every of them ther seid portion of money in a lytyll pursse, and then a lyttyll the auncient of the seid Serjauntz in the name of them all shall unto the seid proposition make answer; and so to drynke, and then to departe the Howsse."

Mr. Russheden, Mr. Townssende, and Mr. Herry's, were the Serjeants elect, and each of them had presented to him the sum of £5.

In these notes I am attempting to trace the history of the teaching of English law in England from the time of Henry II. to the institution of the Council of Legal Education by the four Inns of Court in the year 1851. This history may be conveniently divided into three periods: the first ending about the middle of the sixteenth century; the second at the Restoration; and the third extending to the foundation of the modern system under the control of the Council of Legal Education, and, I ought to add, the Incorporated Law Society. In the extracts from Fortescue, from the Report of Sir Nicholas Bacon, and from the Black Books of Lincoln's Inn, I have endeavoured to present a picture of the methods of legal education during the first of these periods, and of its condition at the expiration of that period about the middle of the sixteenth century.

(*To be continued.*)

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### III.—THE ALASKAN BOUNDARY QUESTION.

IN the matter of the boundary line between Alaska and Canada, there have been numerous discussions in the newspapers and magazines, giving both sides of the question.

Perhaps the most notable recent articles which have been widely read in America, are, one by Mr. Horace Townsend (an Englishman, now resident in the United States, but long in Canada) in the *Fortnightly Review* for September, one by the Hon. J. B. Moore, formerly Assistant Secretary of State of the United States, in the *North American Review* for October, and, most extended and comprehensive of all, one by the Hon. John W. Foster, formerly Secretary of State of

the United States and undoubtedly the leading diplomatic authority of that country, in the *National Geographic Magazine* for November. The latter article contains careful reproductions of many maps bearing upon the discussion. To summarize from them and many less extensive articles, it would seem that the main dispute arises as to the interpretation of the passage in the Convention entered into in 1825 by Great Britain and Russia, fixing the boundary in question. The original text of the Convention is in the following words: "*La limite entre les Possessions Britanniques et la lisière de Cote mentionnée ci-dessus comme devant appartenir à La Russie sera formée par une ligne parallèle aux sinuosités de la cote et qui ne pourra jamais en être éloignée que de dix ligues marines.*"

The American claim is that the strip of territory assured to Russia (to whose title the United States succeeded by purchase) is to be measured from the shore of every bay or harbour, following the sinuosities of the coast. The Canadian claim is that it shall be measured from the border of the open sea. The coast is sheltered by an archipelago of about one thousand islands, many of great size, and the Canadian contention would give some of these and many harbours, notably Lynn Canal, a deep fjord some sixty miles long by six miles wide, to Canada. At the head of this fjord are two principal American settlements, Skagway and Dyea, and also Pyramid Harbour, which are convenient to passes leading to the Canadian goldfields.

Mr. Foster shows that Russia, in the negotiations just prior to 1825, insisted on a continuous holding on the main land for the express purpose of protecting her establishments in the islands, and that England finally conceded her claim in this respect and was prepared to make the strip fifty to one hundred miles wide. That the negotiation was as to whether the boundary should be at the summit or shoreward base of the chain of mountains supposed to run parallel to the shore, that it was finally fixed at the summit with this provision,

that it should never exceed ten marine leagues from the coast. That the negotiators had three maps before them, that of Van Couver, that prepared by the quartermaster's department of St. Petersburg, and Arrowsmith's map. The two former show this range rounding all the bays and inlets including Lynn Canal, the last omits all mountains. The negotiation plainly intended to conform the boundary to this supposed mountain range so outlined, and the language of the convention is perfectly apt for that purpose.

It was so understood at once by both high contracting parties and all cartographers the world over.

As soon as possible (1827) a map was published in St. Petersburg "by order of His Imperial Majesty" showing the line as now claimed by the United States, inscribed "*Limites des Possession Russes et Anglaises d'Après la Traité de 1825.*" The map-maker to his Britannic Majesty adopted and followed this line, and Arrowsmith's map of 1832, which claims to contain the latest information from the Hudson Bay Co., exactly copies the Russian map as to this boundary.

A year before, a map prepared by Bouchette, deputy surveyor general of Lower Canada, and published by Wyld, geographer to the King, and, by permission, dedicated to His Majesty, traces the boundary in the same way.

A map of 1857, prepared by order of the Commissioner of Crown Lands, Toronto, does the same, and no map seems known, whether English, Canadian, American, or of other origin down to 1898, or seventy-three years after the treaty, which indicated any other interpretation than the American. A map by William Ogilvie, astronomer and land surveyor, published in the *Scottish Geographic Magazine* at Edinburgh, July 1898, is one of the latest British maps so indicating the boundary.

To farther show that the harbours and bays were certainly intended to be assured to Russia, by the seventh article of the convention, the vessels of the two powers and their



subjects were, for ten years, allowed to frequent "all the inland seas, gulfs, havens, and creeks on the coast mentioned." Russia terminated the British privilege at the end of ten years, and this plainly shows her exclusive sovereignty over the same.

By authority of both Governments, representatives of the Russian American Co., holding the land under Russia, and the Hudson Bay Co. met at Hamburg in 1839 and agreed upon a lease by the former to the latter of this very strip of territory now debated, and "all bays, inlets, estuaries, rivers, or lakes in that line of coast" for an annual rental, originally, of 2000 otters. Sir George Simpson, Governor of the Hudson Bay Co., signed the lease. It was continued with the consent of both Governments until 1865, and the territory was, by arrangement between the two nations, exempted from hostile operations during the war of the Crimea. In 1857 before a committee of the House of Commons on the British possessions in North America administered by the Hudson Bay Co.—which included Lord John Russell, Lord Stanley, and Mr. Gladstone, and was attended by Chief Justice Draper of Canada, as representative of the Dominion—Sir George Simpson testified in detail as to the said lease, and showed a map exhibiting the tract leased "marked yellow on the map." On this map the yellow territory surrounded all the inlets.

No question was raised by any one from the committee or by the Canadian representative. In 1873 Sir E. Thornton, British Minister at Washington, had a conference with Mr. Fish, Secretary of State of the United States, as to a survey of this boundary, and it was suggested that it would be sufficient to determine the points where the boundary line crossed certain rivers flowing into the heads of Lynn Canal and other inlets. Sir Edward having duly submitted this through the home Government to the Canadian Government, the latter referred it to its surveyor general, who reported

favourably thereon, and the negotiation was accordingly concluded, but the survey was not made for lack of an appropriation. This would seem to recognize the boundary line as above the head of Lynn Canal and other inlets.

In 1876, one Peter Martin committed an assault on a Canadian official thirteen miles above the mouth of the Stikine River. For this he was convicted at Victoria, B.C., and condemned to imprisonment. He complained to the United States Government and claimed its protection on the ground of citizenship, and the Secretary of State presented the case to the British Government. The Canadian Government caused a survey to be made, and the spot where the assault occurred was declared to be American territory; and the Canadian Privy Council, on the communication of the British Foreign Office, decided that the crime was committed in American territory, and that Martin must be released, which was accordingly done.

When Captain Moore, the discoverer of the White Pass, desired in 1888 to pre-empt the land where Skagway now stands, at the head of Lynn Canal, he applied to the Government Land Office at Victoria for that purpose, but was told that the land in question was not subject to the Dominion, and that he must make his application in Washington.

The circumstances attending the removal of the remarkable mission of the Rev. William Duncan to the Metlakatla Indians illustrates still further the previous unquestioned understanding as to the boundary. This band of Indians had been remarkably civilized and Christianized by the devoted missionary, but, as the story was told us as we sailed by the mission last July, he found he could hold them to temperance only by substituting some milder liquor for the communion wine. The British bishop did not deem that he could permit this. Mr. Duncan therefore determined to remove out of British territory and take his Indians with him. He applied to the

American Government, and Annette Island was conveyed to him. Thither he removed, followed by his people, and there has maintained, with unabated success, his happy island village. Under the new claim of Canada, this island would be part of the Dominion.

The general administration of the territory has always been discharged by America since her purchase of it from Russia in 1867. She has established and maintained custom-houses, post-offices, light-houses, and patrolled the coast since settlements have sprung up along it.

The settlers are in great part her citizens, and the sentiment among them is almost universal in favour of her claim. At Skagway last summer, we found but one person who advocated cession to Canada, and he was a hotel clerk, who quite frankly discussed it as advantageous to trade.

The claim of Canada, in its original integrity, seems, however, not to be now insisted upon, but the contest seems to have narrowed down to one over the possession of a harbour near the head of the Lynn Canal.

On July 21, 1899, Sir W. Laurier and Senator Fairbanks, the heads of the Joint High Commission dealing with this subject, decided on an indefinite postponement of the date of re-assembling. On July 22, Sir Charles Tupper, leader of the opposition in the House of Commons at Ottawa, bitterly denounced the course of the American Government and press as to this boundary, and suggested retaliatory measures. The Premier, Sir W. Laurier, replied with more moderation, but regretted the unsatisfactory condition of the negotiations, and said, as compromise seemed almost hopeless, only two alternatives appeared to him logically to remain, namely, arbitration or an appeal to arms, but he disclaimed contemplation of the latter, counselled patience and non-exclusion of American miners, and declared for arbitration.

The Hon. David Mills, Minister of Justice, has presented the Canadian side in a New York newspaper, saying, as to

the Lynn Canal, "Why should we abandon it? It is ours; why should we not have it?"

The objection to this proposition is that, under a convention consummated seventy-three years ago, language was used which, in the judgment of both high contracting parties and of the whole world, gave this territory to Russia. Forty-four years afterwards the United States bought it of Russia, relying upon that convention as so universally understood and acted upon. Thirty-one years thereafter this understanding remained and was acted upon before any communication was made by Great Britain calling it in question. It is submitted that it cannot be said that the language of the treaty is not susceptible of the construction so given. The most that can be said of the Canadian construction is that the language is perhaps subject also to that construction. In cases of ambiguity both American and English courts treat contemporaneous construction, by the creating (as in a law) or contracting parties, as controlling.

On October 20, a *modus vivendi* was announced to have been agreed on, fixing a provisional boundary on the Dalton trail, twenty-one and a quarter miles above Pyramid Harbour and on the Dyea and Skagway trails at the summits of the Chilcoot and White Passes. The objection urged to submitting the matter to arbitration is that it involves territory to which the United States deems itself entitled by purchase and by the long acquiescence of Great Britain during, substantially, three generations; that arbitration has meant in every case compromise; and that it would be quite as just to now ask Great Britain to arbitrate the question of her dominion over the St. Lawrence River because it is the convenient outlet for the great commerce represented at Chicago, as to ask America to submit to arbitration her dominion in the Lynn Canal because Canada has within a few years developed large interests in the hinter land. At a moment when Great Britain, our kindred nation in blood,

language, and forms of civilization, is involved in a painful contest elsewhere, the demands of Canada ought not to be pressed to raise any cause of alienation between us. Nor ought our Government to press its views in any unfriendly spirit.

It is sincerely to be hoped that the *modus vivendi* agreed upon indicates that upon further consideration the right may appear so clear that both sides may, without humiliation or irritation, recognize it and accede to it, and that, if the sovereignty remains with America at the head of the Lynn Canal, she may there, as well as on the opposite side of the Pacific, recognize the wisdom of maintaining the policy of "the open door."

CHARLES NOBLE GREGORY.

#### IV.—FEDERAL CONSTITUTIONAL DEVELOPMENT : A CONTRAST.

NOW that the Australian Colonies have agreed together upon the policy of a Federation, and are about to surrender their individual autonomy to a general government, it may be interesting to see how the Federal idea has worked out in the two countries which have given it a fair and full trial—the United States and Canada. The writer has attempted in this article to take up the constitutions of these two countries separately, beginning with Canada, and to show, principally from decided cases, the course of their constitutional development. The result is certainly surprising, and shows the uncertainty which attends the interpretation of a written constitution by judges of a generation different from that in which it was framed.

In considering the effect to be given to the British North America Act, 1867, or, indeed, to any Act of Parliament,

the intentions of those who drafted it, cannot be taken into consideration by the judicial expounders of the law. The judges are necessarily confined within the four corners of the Statute, and must find its true intent and meaning within those limits. Nevertheless, the student of the constitution of the Dominion, viewing the Act of 1867 as a memorandum of agreement between the various provinces which form the Federation, may fairly be allowed to refer to such sources of information as may be available, to show what the original intentions of the framers of the Canadian constitution were, and how far the Act fulfills the ends which its authors had in view. No apology is therefore needed for opening this article by one or two references to the objects intended by its framers to be carried out in the Act, especially as the instances are in each case quoted from decided cases, so that they appear clothed with the weight of judicial approval.

In the case of *Angers v. Queen Insurance Co.* (3 A.C. 1090; Cartwright's cases on the B.N.A. Act, vol. i. p. 155) in the Supreme Court for Lower Canada, Torrence, J., says, "The framers of our constitution had before them the melancholy warfare which had so long desolated so large a portion of this Continent, and determined that there should be no question as to the supremacy of the general government or the subordinate position of our provinces. It was intended that the general legislature should be strong—far stronger than the Federal Legislature of the United States in relation to the States Governments." The following words are taken from the judgment of Gwynne, J., in *In re Prohibitory Liquor Laws* (24 S.C.R. 170), quoting from a speech of Sir John Macdonald in the debates before confederation: "I am strongly of the belief that we have in a great measure avoided in this system which we propose for the adoption of the people of Canada, the defects which time and events have shown to exist in the American Constitution. We have strengthened the general government ;

we have given the general legislature all the *great subjects* of legislation ; we have conferred on them not only specifically and in detail all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest, not distinctly and exclusively conferred upon the local governments and local legislatures, shall be conferred upon the general government and legislature." Whether these hopeful predictions have since been realized is a matter by no means certain. What subjects of legislative consideration could better be called *great subjects* than the traffic in liquors, bankruptcy, education, and the fisheries ? yet one by one the vital part of the legislative power over these subjects has been handed over to the Provinces by a High Court, whose action in so doing has gone counter to the intentions of the framers of our constitution and even adverse, to their view at least, of the best interests of Canada. And our own Supreme Court, following the lead given it, while holding that the prerogative of pardon is essentially one of the "incidents of sovereignty," yet seems ready to hold that the legislative jurisdiction over it is vested in the Provinces. The exclusive right to appoint Queen's Counsel, which at a first view would seem to be an "incident of sovereignty," has also slipped from the hold of the Central Government. The last case in the Privy Council, dealing with the traffic of liquor, is also of importance when considering that "residuum of power" which Sir John Macdonald proudly points to as belonging to the Parliament of the Dominion. In that case it was held that, though as to matters within the various sub-sections of section 91, the Dominion Parliament might interfere with matters within the various sub-sections of section 92, by virtue of the last clause of section 91, yet as to matters *not* within the sub-sections of section 91 that the general authority of Parliament to legislate for the "peace, order, and good government" of Canada did not confer the right to interfere with matters

included in the various sub-sections of section 92, unless (in the rather vague terms of the judgment) such subject-matter had assumed such proportions as to have become a matter of national interest (*Attorney-General for Ontario v. Attorney-General for Canada*, 96 A.G. 348). It would be futile to deny that this is a very great restriction upon the wide power of legislation *prima facie* given to Parliament by the jurisdiction over "the peace, order, and good government of Canada."

The general doctrine of the distribution of legislative jurisdiction in Canada has received many judicial expositions, but I select the following paragraphs as showing the view which first prevailed, as well as the view which most accords with the intentions of this article. The first quotation is from the judgment of the Privy Council in *L'Union St. Jacques v. Belisle* (1 C. 63), where it was held generally that nothing included in any of the sub-sections of section 91 was included in the last clause of section 92: "Generally all matters of a merely local or private nature in the Province." Lord Selborne, at p. 68, speaking of the jurisdiction of the local legislature to pass the Act impugned (which was an Act to enable an insolvent corporation to wind up its affairs), says, . . . " 'Generally all matters of a merely local or private nature in the Province.' If there is nothing to control that in the 91st section, it would seem manifest that the subject-matter of this Act . . . is a matter of a merely local or private nature in the Province. . . . Clearly this matter is private ; clearly it is local, so far as locality is to be considered, because it is in the Province and in the City of Montreal, and unless, therefore, the general effect of that head of section 92 is for this purpose qualified by something in section 91, it is a matter not only within the competency, but within the exclusive competency of the provincial legislature. *But section 91 qualifies it undoubtedly, if it be within any one of the different classes of subjects there specially enumerated. . . .*"



Again, in the case of *Dow v. Black* (1 C. 95), Sir James W. Colville deals with the general question: "Sections 91 and 92 purport to make a distribution of legislative powers between the Parliament of Canada and the provincial legislatures; section 91 giving a general power of legislation to the Parliament of Canada, subject only to the exception of such matters as by section 92 were made the subjects upon which the provincial legislatures were exclusively to legislate." The judgment of the Privy Council in *Citizens v. Parsons* (1 C. 265), referring to sections 91 and 92, lays down the following rule of interpretation: "It could not have been the intention that a conflict should exist; and in order to prevent such a result, the language of the two sections must be read together, and that of one interpreted and, where necessary, modified by the other. . . . The first question to be decided is, whether the Act impeached in the present appeals falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the legislatures of the provinces; for if it does not, it can be of no validity, and no other question would then arise. It is only when an Act of the provincial legislature *prima facie* falls within one of these classes of subjects that the further questions arise, viz. whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and whether the power of the provincial legislature is or is not thereby overborne." In considering the general question of jurisdiction, it must also be borne in mind that the Privy Council reiterate, in *Bank of Toronto v. Lambe* (12 A.C. 588; 4 C. 7), what they had before laid down, that the Federation Act exhausts the whole range of legislative power.

After these first general statements of the governing principles upon which the jurisdictions of the Provinces and the Dominion are respectively to depend under the B.N.A. Act, we will now see how judicial opinion has since fluctuated and developed upon several important questions which have

at various times exercised the judicial mind. These questions are: (1) The prerogatives of the Crown, (2) the traffic in liquor, (3) Bankruptcy, (4) Education, and (5) the Fisheries; all of them questions raised, doubted, and finally decided in favour of the Provinces, although, *prima facie*, matters more within the jurisdiction of Parliament.

First as to prerogative, and, in particular, of the power to appoint Queen's Counsel. At a first view the prerogative generally would seem to be a matter to be exercised by the Governor-General as the more immediate representative of the Crown. The authorities for this view are *Lenoir v. Ritchie* (3 S.C.R. 575), and *Mercer v. Attorney-General of Ontario*, in the Supreme Court of Canada (5 S.C.R. 538). The first of these cases contains a strong expression of opinion by three judges, that the prerogative of the Crown to appoint titles of honour and dignity is not exercisable by the Lieutenant-Governors, and that consequently such officers have no power to appoint Queen's Counsel. In the case of *Mercer v. Attorney-General*, it was held by three of the judges in the Supreme Court that the Province of Ontario does not represent the Crown for the purpose of its prerogative of escheat. On appeal to the Privy Council, however (8 A.C. 767; 1 C. 1), this decision was reversed, and the prerogative right of escheat was held to be vested by the B.N.A. Act in the provinces. Later, in *Maritime Bank v. Receiver-General of New Brunswick* [1892] (A.C. 437; 5 C. 1), the Lieutenant-Governor, as representing the Province, was held to represent the Queen in the exercise of her prerogative in all matters affecting the rights of the Province as fully as the Governor-General represents her in matters affecting the rights of the Dominion. The last case on this point is *Attorney-General for the Dominion v. Attorney-General for Ontario* [1898] (A.C. 247), on appeal from the Court of Appeal for Ontario (23 A.R. 792), which finally confirms the jurisdiction of the Lieutenant-Governor of Ontario to appoint Queen's

Counsel, and to grant patents of precedence in provincial courts.

The other question which has brought the exercise of the royal prerogative into prominence is the jurisdiction to grant pardons for crime, which was considered fully in the Supreme Court in the case of *Attorney-General for Canada v. Attorney-General for Ontario* (23 S.C.R., 458; 5 C. 517). It was there held that 51 Vict. c. 5 (Ont.), which provides that *in matters within the jurisdiction* of the Legislature all powers, authorities, and functions which, in respect of like matters, were vested in or exercisable by the Governors of the preconfederation provinces should, "so far as this Legislature has power thus to enact," be vested in, and exercisable by the Lieutenant-Governor of the Province, is *intra vires*. The decision, however, is based upon the saving clause, "so far as this Legislature has power to enact," and proceeds upon the ground that no act can be unconstitutional which expressly limits itself to its lawful powers. The judges expressly refused to decide upon the right of the Legislature of Ontario to confer on the Lieutenant-Governor the prerogative of pardoning offenders against even provincial laws, though, by their opinions, it would appear as if they thought such power existed.

It thus seems to be lawful for a provincial legislature to pass an act *prima facie ultra vires* as infringing upon the legislative jurisdiction of Parliament provided they express themselves as legislating only "in so far as they have power to enact." Their powers of legislation are by this decision extended practically indefinitely, provided only the saving clause be inserted.

*Liquor Traffic*—The first case of importance after confederation is the case of *Reg. v. Justices of King's* (2 Pugsley, 539; 2 C. 499), where the provincial legislature of New Brunswick was held to have no power to authorize municipal by-laws totally prohibiting the sale of liquor. The grant of

jurisdiction to the Provinces over licences, contained in section 92, was first held to refer to retail licences only, leaving the granting of wholesale licences to the Dominion as a matter of "trade and commerce:" *Severn v. Reg.* (2 S.C.R. 70; 1 C. 414). In *Frederickton v. Reg.* (3 S.C.R. 505; 2 C. 27), the Supreme Court held sustaining the validity of the Canada Temperance Act, 1878, the "Scott Act," that the power to prohibit the sale of liquor was lodged *exclusively* in the Dominion under its jurisdiction over "trade and commerce." This same statute was also confirmed by the Privy Council in *Russell v. Reg.* (7 A.C. 829; 2 C. 12), which was virtually an appeal from *Frederickton v. Reg.*, the authority of Parliament being based either upon its jurisdiction over the "peace, order, and good government of Canada," or over "trade and commerce." Their lordships, however, while not dissenting from the former case, express no opinion as to whether the jurisdiction is or is not exclusive. This was followed in the next year by *Hodge v. Reg.* (9 A.C. 117; 3 C. 144), which declared the Ontario Liquor Licence Act of 1877 compatible with the Scott Act, and equally valid. The next step was to declare the Dominion Liquor Licence Acts of 1883 and 1884 *ultra vires*; *re* Liquor Licence Act (4 C. 342). The grounds of the decision in *Severn v. Reg.*, which invalidated provincial wholesale licences, were next overturned both in the Supreme Court and the Privy Council. The judgment in that case was founded on two considerations: (1) that such legislation was an interference with trade and commerce; (2) that a brewer's licence is not *ejusdem generis* with the licences particularly mentioned in section 92 (9). So far as the first ground is concerned, *Hodge v. Reg.* must be considered to deprive *Severn v. Reg.* of its support. In the Supreme Court also the case of *Molson v. Lambe* (16 S.C.R. 253) overrules *Severn v. Reg.* on this ground. Ritchie, C.J., there says, "In view of the cases determined by the Privy Council since the case of *Severn v. Reg.* was decided in this

Court, which appear to me to have established conclusively that the right and power to legislate in relation to the issue of licences for the sale of intoxicating liquors *by wholesale and retail* belong to the local legislatures, we are bound to hold the Quebec Licence Act, 1878 . . . valid and constitutional." As to the second ground for the decision in *Severn v. Reg.*, the judgment of the Privy Council in *Bank of Toronto v. Lambe* (12 A.C. 575) must be taken as an affirmation of the power of a local legislature to levy such a licence fee as being a "direct tax" within section 92 (2). The next decision of importance is that of the Court of Appeal in *In re Local Option Act* (18 A.R. 572). It was held confirming the Ontario Local Option Act, 53 Vict. c. 56, section 18, that the Provincial Legislatures may empower a municipality to pass prohibitory by-laws at least as to retail trade (the wholesale trade not being taken into consideration). This case does not decide that a provincial legislature could pass a general prohibitory law; the Court treating this question as having been decided against the provinces in *Russell v. Reg.* Of course the result is that the provinces can do indirectly what they cannot do directly. The next case is also a decision of the Court of Appeal, *Reg. v. Halliday* (21 A.R. 42), where it was decided that even brewers who had taken out Dominion licences to manufacture and sell at wholesale were obliged to take out licences under the Ontario Liquor Licence Act, R.S.O., 1887 (c. 194). The last case on this point is *Attorney-General for Ontario v. Attorney-General for Canada and the Distillers' Association* [1896] (A.C. 348; 5 C. 295), which may be considered as virtually an appeal *In re Local Option Act*, and also affirms the validity of that Act, subject, however, to its becoming inoperative in any locality which adopts the provisions of the Canada Temperance Act of 1886.

*Bankruptcy and Insolvency.*—It was held in the case of *L'Union St. Jacques v. Belisle* (L.R. 6 P.C. 31; 1 C. 63) that a

provincial Act providing for the arrangement of the affairs of a company, and forcing commutation upon certain annuitants, was *intra vires*, as being merely a matter of local or private concern in the Province. The next case, *Quirt v. Reg.* (19 S.E.R. 510 ; 5 C. 456), leans the other way, however. It was there held that the Dominion Parliament, in its jurisdiction over "banks and banking," or "bankruptcy and insolvency," had jurisdiction to incorporate the trustees of a bank which had become insolvent before confederation and assigned its property to trustees. The case of *L'Union St. Jacques v. Belisle* is distinguished by Judge Strong, at p. 517, on the ground that the earlier case was expressly not a bankruptcy act, "but was rather an enactment designed for the purpose of avoiding such a result." The question was left by these decisions pretty much within the jurisdiction of Parliament, but their complete control of it is shaken very considerably by the decision of the Privy Council in *Attorney-General of Canada v. Attorney-General of Ontario* [1894] (A.C. 189 ; 5 C. 266), where the Ontario Assignments and Preferences Act was held *intra vires*. This case, however, contains a most important qualification, viz. that the powers conferred by the provincial Assignments Act are exercisable only until an insolvency law of general application is passed by Parliament, which is perhaps the only break in the steady stream of decisions which have of late years undermined the apparently stable fabric of the National Government. Even this chance of escape from provincial aggression has now, however, been taken from the Dominion Government in the Fisheries Appeal which came subsequently before the same court, where it was held in effect that if jurisdiction is conferred upon either Parliament or the local legislatures by the terms of the B.N.A. Act, such jurisdiction is exclusive and not dependent upon the action of the other legislative body. In delivering the judgment of the committee in that case, Lord Herschell says, speaking of the right of a province to

"regulate" fisheries, "It has been suggested, and this view has been adopted by some of the judges of the Supreme Court, that although any Dominion legislation dealing with the subject would override provincial legislation, the latter is nevertheless valid unless and until the Dominion Parliament so legislates. Their lordships think that such a view does not give their due effect to the terms of section 91, and in particular to the word 'exclusively.' It would authorize, for example, the enactment of a bankruptcy law or a copyright law in any of the Provinces unless and until the Dominion Parliament passed enactments dealing with these subjects. Their lordships do not think this is consistent with the language and manifest intention of the British North America Act. It is true that this Board held in the case of *Attorney-General of Canada v. Attorney-General of Ontario* [1894], (A.C. 189), that a law passed by a provincial legislature which affected the assignments and property of insolvent persons was valid as falling within the heading 'Property and Civil Rights,' although it was of such a nature that it would be a suitable auxiliary provision to a bankruptcy law. But the ground of this decision was that the law in question did not fall within the class 'Bankruptcy and Insolvency' in the sense in which those words were used in section 91."

*Education.* — By the Dominion Statute known as the Manitoba Act (33 Vict. c. 3, sec. 22), it was provided that the provincial legislature of Manitoba should exclusively make laws in relation to education, but so as not to "prejudicially affect any right or privilege with respect to denominational schools which any class of persons had *by law or practice* in the province at the Union," and an appeal was also given to the Governor-General in Council, "from any Act or decision of the Legislature of the Province, or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education (acquired since the Union)." It seemed

at a first view of this act as though the rights of the minority in regard to denominational schools were well safeguarded by it, and their right to maintain separate schools was in fact acquiesced in till the year 1890, when the Province passed the Public Schools Act of that year, which established national unsectarian schools and refused state aid or exemption from taxation for their support even to the supporters of a system of denominational schools previously existing. The Act was held *ultra vires* by the Supreme Court, as being an interference with the rights of the minority conferred by the above Act, but the Privy Council reversed their decision, *City of Winnipeg v. Barrett* (92 A.C. 445 ; 5 C. 32), holding that the establishment of a system of national schools was no interference with the right of any denomination to support its own schools, and did not "prejudicially affect any right or privilege" of any such minority. The subsequent grant of a right of appeal to the Governor-General in Council under subsection 2 of the same section of the Act, recognized in *Brophy v. Attorney-General of Manitoba* [1895] (A.C. 202 ; 5 C. 156), was not calculated to prove, and has in the event not proved, of any practical advantage to the minority.

The case of the Fisheries offers but a single decision, *Attorney-General of Canada v. Attorney-General of Ontario, Quebec, etc.* [1898] (A.C. 700). It was there held that notwithstanding the wide grant of legislative jurisdiction to Parliament over "sea coast and inland fisheries," the proprietary rights to the beds of lakes, rivers, and other waters within the limits of any province remained vested in the Province after confederation, and that the grant of legislative jurisdiction over them to Parliament could not be presumed to be a grant of any proprietary interest in such waters, or their beds, or the fish found therein. The right of Parliament to grant the exclusive right to fish in any such waters was therefore denied, and such power was handed over to the Provinces after over thirty years of unquestioned exercise by the



**Dominion.** The gift to Parliament of the exclusive right to provide close seasons and other such-like "regulations" of fisheries is of trivial importance compared to the great proprietary question. Lord Herschell, in delivering the judgment of the committee, said, "It must be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it."

We will now turn and briefly sketch the changes of opinion which have taken place in the United States upon the interpretation of its constitution so far as the distribution of legislative power is concerned. A graphic view of the American constitution as intended by its framers, and as understood and approved of by the generation which first acted under it, is to be found in Mr. Woodrow Wilson's work on Congressional Government, which quotes from a letter of John Adams, written in 1814 to his friend John Taylor. "Is there," says Mr. Adams, "a constitution upon record more complicated with balances than ours? In the first place, eighteen states and some territories are balanced against the National Government. . . . In the second place, the House of Representatives is balanced against the Senate, the Senate against the House. In the third place, the executive authority is in some degree balanced against the legislative. In the fourth place, the judicial power is balanced against the House, the Senate, the executive power, and the State Governments. In the fifth place, the Senate is balanced against the President in all appointments to office, etc. . . . In the sixth place, the people hold in their hands the balance against their own representatives by biennial elections. In the seventh place,

the legislatures of the several States are balanced against the Senate by sextennial elections. In the eighth place, the electors are balanced against the people in the choice of a President. All of these balances are reckoned essential in the theory of the Constitution ; but none is so quintessential as that between the National and State Governments ; it is the pivotal quality of the system, indicating its principle, which is its federal characteristic."

The relatively strong position occupied by the State Legislatures in comparison with the National Government in the minds of the great men of 1787 is well illustrated by a quotation in Mr. Wilson's work from a speech of Hamilton's, in which he said, "'It will always be far more easy for the State Governments to encroach upon the national authorities than for the National Government to encroach upon the State authorities,' and he seemed to furnish abundant support for the opinion when he added that 'the proof of this proposition turns upon the greater degree of influence which the State Governments, if they administer their affairs uprightly and prudently, will generally possess over the people.'"

"Read in the light of the present day, such views constitute the most striking of all commentaries upon our constitutional history. Manifestly, the powers reserved to the States were expected to serve as a very real and potent check upon the Federal Government ; and yet we can see plainly enough now that this balance of State against national authorities has proved, of all constitutional checks, the least effectual. The proof of the pudding is the eating thereof, and we can nowadays detect in it none of that strong flavour of State sovereignty which its cooks thought they were giving it. It smacks rather of federal omnipotence, which they thought to mix in only in very small and judicious quantities." The first step in the expansion of the national power was not long in coming, but came in an unexpected way. "Hamilton,

as Secretary of the Treasury (1789), had taken care at the very beginning to set the national policy in ways which would unavoidably lead to an almost indefinite expansion of federal influence. . . . In his famous Report on Manufactures were laid the foundations of that system of protective duties which was destined to hang all the industries of the country upon the skirts of the federal power, and to make every trade and craft in the land sensitive to every wind of party that might blow at Washington; and in his equally celebrated Report in favour of the establishment of a National Bank, there was called into requisition for the first time that puissant doctrine of the 'implied powers' of the Constitution which has ever since been the chief dynamic principle in our constitutional history. 'This great doctrine, embodying the principle of liberal construction, was,' in the language of Mr. Lodge, 'the most formidable weapon in the armoury of the Constitution; and when Hamilton grasped it he knew, and his opponents felt, that here was something capable of conferring on the Federal Government powers of almost any extent.' . . . Given out at length with the sanction of the federal Supreme Court, and containing as it did in its manifest character as a doctrine of legislative prerogative a very vigorous principle of constitutional growth, it quickly constituted Congress the dominant, nay, the irresistible, power of the federal system, relegating some of the chief balances of the Constitution to an insignificant *rôle* in the 'literary' theory of our institutions."

The clause under whose protecting care the implied powers of Congress have assumed such an overwhelming force is the last clause of sec. 8, Art. I.: "The Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof." The last and most masterly exposition of this doctrine will be found in the judgment of Chief Justice

Marshall, in the case of *McCulloch v. Maryland*, 4 Wheat. 207. A few sentences quoted from page 272 will serve to show the view taken by the Court: "We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." The practical point decided in this case was that Congress has power to incorporate a bank, and that the States have no power by taxation or otherwise to retard, impede, burden, or in any way control the operation of a constitutional law enacted by Congress to carry into effect a power vested in it. It was attempted, as we shall see, in *Bank of Toronto v. Lambe*, to subordinate our Provincial Legislatures to the National Government by a similar restriction, but the Privy Council interposed for their protection.

The practical result of this doctrine (quoting again from Wilson) "illustrates still more forcibly the altered and declining status of the States in the constitutional system. One very practical issue has been to bring the power of federal government home to every man's door as, no less than his own State Government, his immediate overlord. Of course every new province into which Congress has been allured by the principle of implied powers has required for its administration a greater or less enlargement of the national civil service, which now through its hundred thousand officers carries into every community of the land

a sense of federal power as the power of powers, and fixes the federal authority as it were in the very habits of society." This last paragraph applies in almost identical terms to Canada, with this difference, that here the expansion in the civil service has all been on the side of the Provinces. The last and best instance of this is furnished by the late Fisheries decision of the Privy Council, one of the consequences of which has been the dismissal of the Dominion Fishery Inspectors, and the creation of provincial officers with powers similar to those of the former Dominion officials.

Perhaps arising out of the doctrine of the implied powers of Congress, and to offset it, came the attempt on behalf of the States to assert a jurisdiction in their legislatures to interfere should Congress, by accident or design, overstep its rights and encroach upon the States. I cannot do better than quote the substance of the controversy from a speech of Daniel Webster, in reply to Colonel Hayne, delivered in the Senate on January 26, 1830. "I understand the honourable gentleman for South Carolina to maintain that it is a right of the State Legislatures to interfere whenever in their judgment this Government transcends its constitutional limits, and to arrest the operation of its laws. . . . I understand him to maintain that the ultimate power of judging of the constitutional extent of its own authority is not lodged exclusively in the General Government or any branch of it, but that, on the contrary, the States may lawfully decide for themselves and each State for itself whether, in a given case, the act of the General Government transcends its power. I understand him to insist that if the exigencies of the case in the opinion of any State Government require it, such State Government may by its own sovereign authority annul an act of the General Government which it deems plainly and palpably unconstitutional. . . . I do not admit, that under the Constitution and in

conformity with it, there is any mode in which a State Government as a member of the Union can interfere and stop the progress of the General Government, by force of her own laws, under any circumstances whatever. . . . Some authority must therefore necessarily exist having the ultimate jurisdiction to fix and ascertain the interpretation of these grants, restrictions, and prohibitions. The Constitution has itself pointed out, ordained, and established that authority. How has it accomplished this great and essential end? By declaring (Art. VI.) that 'the Constitution and the laws of the United States made in pursuance thereof, shall be the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding.' This was the first great step. By this the supremacy of the Constitution and the laws of the United States is declared. The people so will it. No State law is to be valid which comes in conflict with the Constitution or any law of the United States passed in pursuance of it. But who shall decide this question of interference? This the Constitution itself declares also by declaring (Art. III.) 'that the judicial power shall extend to all cases arising under the Constitution and laws of the United States.' These two provisions cover the whole ground." This view was the one adopted by the Courts, and nothing has since been heard of such pretensions on the part of the individual States.

The States made their next stand in 1850, on one of the numerous questions arising out of the institution of slavery. Article IV. section 2 of the Constitution provides that any person "held to service" in one State and escaping into another "shall be delivered up on claim of the party to whom such service" may be due. Under this clause the question was raised—in which Government was lodged the jurisdiction of seeing to its enforcement? A claim was made to legislative jurisdiction on behalf of the States as being evidently contemplated by the Constitution and sanctioned

by their greater interest in the question ; but it was ultimately held (*Prigg v. Pennsylvania*, 16 Peters, 539) that the power and the obligation lay with the Central Government. I may be permitted to quote again from Daniel Webster, speaking in the Senate, March 7th, 1850. "I have always thought that the Constitution addressed itself to the legislatures of the States or to the States themselves. It says that those persons escaping to other States 'shall be delivered up' ; and I confess I have always been of the opinion that it was an injunction upon the States themselves. When it is said that a person escaping into another State and coming, therefore, within the jurisdiction of that State, shall be delivered up, it seems to me the import of the clause is that the State itself, in obedience to the Constitution, shall cause him to be delivered up. That is my judgment. I have always entertained that opinion, and I entertain it now. But when the subject some years ago was before the Supreme Court of the United States, the majority of the judges held that the power to cause fugitives from service to be delivered up was a power to be exercised under the authority of this (the Federal) Government." A short paragraph from the judgment of Mr. Justice Story, in *Prigg v. Pennsylvania*, will show the view taken by the Supreme Court. "If . . . the Constitution guarantees the right, and if it requires the delivery upon the claim of the owner (as cannot well be doubted), the natural inference certainly is that the National Government is clothed with the appropriate authority and functions to enforce it."

Interesting questions of interpretation arose in both countries, as they were sure to do, over the clauses granting apparently conflicting jurisdiction to the general and local legislatures ; and I will refer to one case on each side of the border. The Canadian case is that of *Bank of Toronto v. Lambe* (4 C. 7), in which also a futile attempt was made to assimilate the principles of interpretation to be applied to

the two constitutions. An extract from the judgment of the Privy Council is as follows: "Their Lordships have been invited . . . to apply to the construction of the Federation Act the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great judge in a parallel case. But he was dealing with the constitution of the United States. Under that constitution, as their Lordships understand, each State may make laws for itself uncontrolled by the federal power and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a constitution Chief Justice Marshall found one of those limits at the point at which the action of the State legislatures came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the provincial legislatures under section 92, which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under section 91. It is quite impossible to argue from the one case to the other." The Court then proceeded to hold that a subject might be no less of provincial jurisdiction, because if that jurisdiction is exercised the field of Dominion jurisdiction would be thereby lessened.

The view taken of their constitution in the American courts is well illustrated by the case of the *City of New York v. Miln* (2 Peters (U.S. Sup. Ct.), 1371), the judgment in which contains the following remarks: "It appears that whilst a State is acting within the legitimate scope of its power as to the end to be obtained, it may use whatsoever means, being appropriate to that end, it may think fit . . . subject only . . . to this limitation, that in the event of collision the law of the State must yield to the law of Congress. This must be understood, of course, as meaning that the law of Congress is passed upon a subject within the sphere of its power."



These decisions are of importance in that they clearly show with what different eyes our constitutions and that of the United States have been viewed by the highest tribunals of both countries. We started out with a central government of general powers only limited by a few enumerated exceptions ; while in America the general residuum of power is clearly vested if anywhere in the States. Article X. of the amendments to the Constitution declares, "The powers not delegated by the Constitution nor prohibited by it to the States are reserved to the States respectively, or to the people." The article of the American Constitution from which the more exalted view of the powers of Congress derives its greatest strength is the sixth, which declares that "the constitution and the laws of the United States made in pursuance thereof, shall be the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding ;" yet how feeble this is, especially when read with the tenth amendment, in comparison with the last clause of our section 91 : "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." \* Yet mark the result. In Canada, if a subject-matter be shown to come within section 92, the jurisdiction of the Province over it is assured, although it may be so exercised as seriously to impede the jurisdiction of Parliament over a subject-matter equally within its scope. In the United States, on the contrary, if a State enactment impedes the exercise by Congress of the jurisdiction conferred upon it by the Constitution, it will be declared void, though it may seem otherwise to be a fit subject for State legislation. If the result in America has savoured a trifle of Congressional usurpation, supporting itself on judge-made law, the result in Canada is directly attributable to provincial

selfishness, backed by the judiciary whose combined efforts have proved too much for the noble fabric of Confederation, so bravely launched in 1867.

We have now followed the Canadian and the American Constitutions through the various stages of their construction, growth, and interpretation. We have seen the narrow constitution of the Republic enlarged and strengthened by an ambitious national government and a broad-minded Supreme Court until the general Government has obtained a national power and character which defer in nothing to the oldest Government in Europe. On the contrary, we have seen the Canadian Constitution, apparently so broad, cut down and explained away by the highest court in the Empire until the completed fabric would not be recognized by its framers, whose most clearly-expressed intentions have been set at naught, and whose dearest hopes have been frustrated. The Great Court beyond the seas has attacked our charter of government in the narrowest spirit, and, disregarding the constantly reiterated intention of the B.N.A. Act, which was to found a central government of almost monarchical strength, has constantly played into the hands of the Provinces, and the Dominion Government has again and again been forced to resign new spheres of jurisdiction to Provincial control.

The last assault upon the stronghold of the Dominion has culminated in the recent fisheries appeal, in which the Privy Council has turned over to the Provinces the jurisdiction over all territorial fishing-grounds, with the right to grant licences and appoint inspectors, after more than thirty years of its exercise by the Dominion authorities. Had their Lordships of the Privy Council been actuated by those principles of Imperialism which might have been expected in the advisers of the British Crown, the Dominion Government, supported by their decisions, would have been rendered capable of dealing successfully with the various local and

selfish interests, which, by acting under Provincial aggression, have weakened its influence and cut away its jurisdiction. This carping spirit, which has aimed at restricting the Dominion jurisdiction so far as is permissible by the letter of the Act, has naturally encouraged the Provinces in further pretensions and in extravagant claims to jurisdiction which can only be characterized as mutiny against the Constitution.

One of the earliest, though not perhaps the most glaring, of these assaults upon the jurisdiction of the Parliament of Canada, is furnished by the attitude of Manitoba towards the Canadian Pacific Railway. The Dominion Government had made a contract with the Company, embodied in Statute 44 *Vict. c. 1*, by section 15 of which they bound themselves not to authorize the construction of any railway which might come into competition with the Canadian Pacific Railway, within a certain limited area and for a certain limited time. When the Company's charter was under discussion in the House of Commons, this clause was thoroughly considered, and was well known to the Province of Manitoba, and although it was regarded with some doubt by that Province, and was objected to by many of its public men, it was not vigorously opposed, and became law. No objection was made to it during the period when the railway was building, nor for some years after, but later Provincial Acts were passed incorporating railways, the construction of which would be in direct conflict with the guarantee thus solemnly given to the Canadian Pacific Railway. Several at least of these Acts, though passed under colour of securing cheaper freight rates for the West, were attempts to give the Northern Pacific an American railway, and the great competitor of the Canadian Pacific a terminus in Winnipeg, in order that all the west-bound freight might pass through Manitoba. Most naturally and rightly the power of disallowance was invoked by the Dominion Government to protect the Canadian line in their privileges under the contract. "It is notorious that disputes

took place as to the effect of this contract, as to the actual and the implied obligations of the Government and of the Parliament of Canada towards the Canadian Pacific Railway Company under it with reference to the Province of Manitoba. It is notorious that for many years that Province had been asserting its right under the Constitution . . . to charter provincial railways, which should run within the prohibited territory. It is notorious that agitation and discontent had ensued upon the repeated disallowance of those Acts by the Executive of Canada, and that the executive action of the Government of Canada had been ratified and confirmed by the Parliament of Canada. All these disputes culminated (in 1888) in an arrangement which is upon the Statute-book, whereby the clause in question was erased from the contract with the Canadian Pacific Railway Company for certain considerations, which the Government, with the assent of Parliament, agreed to give." (Argument of Mr. Blake in the Crossings' Case)

The special privileges of the Canadian Pacific Railway under the contract were thus blotted out, and it fell back upon its ordinary rights as a Dominion Railway. But this did not end the matter. Manitoba, having forced the rescission of the contract, followed up its advantage by an attack upon the plain Dominion jurisdiction over railways conferred by the B.N.A. Act. By section 92, sub-section 10(c), any railway may, either before or after construction, "be declared by the Parliament of Canada to be for the general advantage of Canada," and thereafter it becomes exclusively subject to the legislative jurisdiction of Parliament. In pursuance of this power the Parliament of Canada enacted section 177 of the Railway Act of 1886, under which any railway, crossing certain other named railways (of which the Canadian Pacific Railway was one), was declared to become, by virtue of so crossing, a work for the general advantage of Canada and within the exclusive jurisdiction of its Parliament. The

Legislature of Manitoba had, during the negotiations which led up to the amendment of the Dominion contract with the Canadian Pacific Railway, authorized the construction of a Provincial Railway crossing the Canadian Pacific Railway. The Parliament of Canada, in furtherance of the policy which had induced it to alter the agreement with the Canadian Pacific Railway, passed section 308 of the Railway Act of 1888, which enabled the Dominion Executive, by proclamation, to exempt from the former section 177 any railway *already* authorized by Act of the Province of Manitoba. The railway already mentioned, known as the Portage Extension of the Red River Valley Railway, applied for leave to cross the Canadian Pacific Railway, although no proclamation had been issued exempting it from the general prohibition contained in the Railway Act, and in the absence of the proclamation the validity of the Act, authorizing its construction, was impugned. Upon a reference to the Supreme Court, however, the validity of the Act was affirmed; but as no reasons were given by the Court the decision loses much of its force, as there were other grounds upon which it might have been rested without the necessity of shaking the general rule, that when Parliament has declared any such work to be for the general advantage of Canada, no provincial legislation relating to it can be valid. (See Cassel's *Sup. Ct. Digest*, 487.)

Another and flagrant instance of the piratical tendencies which seem to have taken hold of the Provinces was furnished last year by the British Columbia Labour Regulation Act, 1898 (61 Vict. c. 28). This Statute was passed at the instance of the labouring class in British Columbia, to prevent the competition of Chinese and Japanese coolies with white labour on the railways and other great works of the Province. It declared in substance that no Chinese or Japanese are to be employed on any works erected or authorized under any Act passed or amended by the Legislature of British Columbia in 1898 or following years, and subjects all offenders to fine

and imprisonment. How the ruling party in British Columbia attempted to justify such an usurpation of the Dominion jurisdiction over "Naturalization and Aliens" conferred by the B.N.A. Act, it is difficult to understand. After protracted negotiations, and only after the refusal of the Provincial Government to recognize the jurisdiction of Parliament, this Act, together with another similarly obnoxious measure of the same session, has been disallowed by the Governor-General in Council.

The melancholy conclusion to be drawn from this aggressive attitude of the Provinces is obvious to an impartial observer of the development of our constitution. Ours is a paper constitution, of great completeness and seeming symmetry, of great apparent wisdom and strength, and yet but a paper constitution. It is not founded on slow historical development, and in this way expressive of the final wishes of the Canadian people as to their form of government. It is not a tyrannical government imposed on helpless subjects by a stronger power, but a charter of government constructed by a few minds and offered for the voluntary acceptance of the great body to be governed under it. It has no strength except from their support, no vitality except through their affection, no dignity but by their veneration. And can it be said that the Provinces of the Dominion in particular, or its people as a whole, have shown that support and affection for the Federation which are necessary to maintain its dignity and strength? The instances I have named, and others which might easily be cited, have shown a self-seeking disregard for the spirit of our institutions on the part of the Provinces, which is only made possible by the nerveless indifference of the great body of our people. The Provinces have assailed the powers of the National Government, the people have stood by and observed the attacks without interest or interference, while the Privy Council has clothed them with the sanction of its august approval. The Government

alone is powerless without the people, and so far it is manifest that the Canadians have not shown that pride and jealousy of their national government which are requisite to found a great single-minded country. The end is plainly within sight. If the people of this great Dominion do not, to the utmost of their ability, individually and collectively, support and maintain the Federation to the disregard of all other interests, our carefully prepared Constitution, from which so much was hoped and expected, will fail us when most needed, and we shall become little better than we once were, a number of scattered Provinces, without a history for the past, influence in the present, or prospects for the future.

W. MARTIN GRIFFIN.

#### V.—MODEL BYE-LAWS.\*

EVERY one is subject more or less to bye-laws, actual or potential. If County, Urban, and Rural District rates must be paid, we may, at least, have a certain grim satisfaction in the assurance that some part of the money will be spent in paying for the framing of bye-laws, imposing reasonable penalties upon those subject to their operation who break all and sundry their provisions upon municipal, sanitary, and a thousand other matters. The two books, one of them already a standard compilation upon a particular branch of these bye-laws, which are the main subject of these remarks, deal with bye-laws and regulations, nearly all of them officially sanctioned, and in a sense originated, by the Local Government Board, under the Public Health and incorporated statutes.

\* *Model Bye-laws, Rules and Regulations, under the Public Health and other Acts.*—By W. MACKENZIE and P. HANDFORD. London: Shaw & Sons, Butterworth & Co. Vols. I. and II.

*Knights' Annotated Model Bye-laws of the Local Government Board*, 6th edition. London: Knight & Co. 1899.

Now, it is obvious that there must be certain checks and safeguards in any well-regulated society upon the interference with the right of action and liberty of the individual which these bye-laws may effect, even when they are bye-laws of a public representative body. The word "reasonable," before used, is of interest in this connection. It is said that in the case of the bye-laws made by the municipal corporations of cities for their internal government, the question of reasonableness was of no moment, while, as to those made by such corporations as to external matters, or by unincorporated townships, in order to have legal validity, it was essential that they should be "reasonable." The following explanation is suggested: incorporated cities could, without any custom, regulate their internal affairs, townships could make bye-laws only where a custom enabling them to pass such regulations was shown to exist. It was always supposed to be a prime necessity to the validity in law, of a custom, or local usage, that it should be reasonable, and thus it has been forcibly argued that what was requisite in the case of the paternal custom, so to speak, was required in the case of the affiliated bye-law. Be this as it may, Lord Coke's authority can be quoted for the proposition that the penalty imposed by a bye-law must be a reasonable penalty.

The usual touchstone which is employed to test the validity of a bye-law—there are several others, viz. the repugnancy of the bye-laws to the laws of the realm, that it was *ultra vires*, or beyond the powers of the body, chartered or otherwise, assuming to impose it, etc.—the usual touchstone, as recent reported decisions demonstrate, is this quality of reasonableness. But certain ideas entertained in legal quarters, on this point, must have sustained a shock by the judicial deliverances of the learned judges in the case of *Kruse v. Johnson*. What Messrs. Mackenzie and Handford's views are upon this decision we are left to conjecture. The case is referred to twice in their *Model*



*Bye-laws and Regulations.* In the first instance, the definition of a bye-law contained in the judgment of the Lord Chief Justice is set out to the following effect: "A bye-law . . . I take to be an ordinance affecting the public, or some portion of the public, imposed by some authority clothed with statutory powers, ordering something to be done or not to be done, and accompanied by some sanction or penalty for its non-observance. It necessarily involves restriction of liberty of action by persons who come under its operation, as to acts which, but for such bye-law, they would be free to do or not to do as they pleased. Further, it involves this consequence—that if validly made, it has the force of law within the sphere of its legitimate operation." In the second instance it is referred to in a note to a model bye-law of the Local Government Board, directed against the use of indecent language to the annoyance of people using a pleasure-ground. This decision must, however, have been constantly present in the authors' minds in considering the effect of the official bye-laws, of which the main portion of their own and Messrs. Knights' book consists, and in the framing of the bye-laws they propose upon such subjects as public slaughter-houses and omnibuses, in connection with which, at the date of the publication of their book, no model forms had been issued.

The bye-law in *Kruse v. Johnson* was one issued by a County Council having the same powers in relation to their county as the council of a borough have under section 23 of the Municipal Corporations Act, 1882, enabling such council to make bye-laws for the good rule and government of the borough, and for the prevention and suppression of nuisances not summarily punishable. The County Council, by bye-laws, prohibited persons from playing and singing in a public place, within fifty yards of a dwelling-house, after being required by any constable or inmate of the house to desist, even when not acting to the annoyance of any person, as the bye-law regulating pleasure-grounds

provides. The bye-law in *Kruse v. Johnson* was held, by six learned judges to one, to be reasonable and valid. In *Strickland v. Hayes*, referred to in the argument, a somewhat similar bye-law, was declared to be unreasonable, on the ground that it contained no words importing that the acts must cause annoyance. The importance of the *Kruse v. Johnson* judgments, in connection with our subject, lies in the remarks therein upon the subject of the invalidity of bye-laws of public representative bodies—of which those bye-laws contained in Messrs. Mackenzie and Knights' works are examples—on the ground of unreasonableness. The Lord Chief Justice appears, in some of his remarks as reported, to support the argument, that such bye-laws, imposed as they are after antecedent publication, subject to official sanction and to the disallowance of the Sovereign in Council, can never be invalid on this ground. Mr. Justice Mathew, who dissented in *Kruse v. Johnson*, and the Lord Chief Justice in another portion of his judgment, lend support to the supposition that, though reluctant to do so, the Courts may yet hold such bye-laws invalid. The matter is one of great importance to the editors of such books on bye-laws as those under review. Apparently the authors, while referring to the decisions mentioned in their notes to the Board's clause, do not think any omission of the words importing annoyance to be desirable, notwithstanding the strong bias judicially manifested in that direction by the Lord Chief Justice and five learned judges in the specially constituted Divisional Court.

The books under review contain a very extensive compilation of the model bye-laws issued under the Public Health Acts, with, in certain cases, alternative clauses. That those model bye-laws, which have been in use in multitudinous instances for a long course of years, *e.g.* those as to new streets and buildings, are not legally invalid seems to be an assertion which few would care to controvert. The Local Government Board, in drawing them up, have availed themselves of the

assistance of the best procurable talent legal and otherwise. It is a body which has no other object in view than to carry out the wishes of the legislature as expressed in the Public Health and other authorizing Statutes without partiality. And if, as pointed out by Mr. Mackenzie in the case of the Building Regulations in Rural Districts, the model bye-laws are by some considered to be unduly stringent, those who may come under their operation would do well to consider them before taking steps which lead to unpleasant results, rather than, not having done so, to engage in a legal contest of doubtful issue by impugning the reasonableness of the bye-law objected to. At any rate, taking into consideration the enormous numbers of bye-laws in general, and of those under the Public Health Acts in particular, the comparative small number of reported cases to be found, furnishes an argument in favour of those who would assert that the bye-laws of public representative bodies are in the main legally valid.

The circular letter of the Local Government Board accompanying the original forms of model bye-laws, setting out, as it does, the requirements of bye-laws generally, stating that repugnancy to the laws of the realm is fatal to their validity, and drawing attention to the fact that if the matters provided for in them are already the subject of statutory enactment, they are unnecessary, receives, as it should do, due prominence in both Messrs. Mackenzie and Handford's and Messrs. Knights' works. Attention is also directed to the provision of the Interpretation Act, 1889, section 3, to the effect that expressions used in bye-laws made after January 1, 1890, shall have the same meanings as in the Act by which they are authorized to be made, and to the fact that where, as in the case of the expression "Building" a term is contained in the Public Health Acts, but not defined, bye-laws cannot define what it means (*Slaughter v. Mayor of Sunderland*, 60 L.J., M.C. 91).

Messrs. Mackenzie and Handford's book, which is of a wider scope than Messrs. Knights' compilation, contains many series of bye-laws and regulations, some of them very recently issued, and others, as has been said, original, none of the latter, so far as we can see, being of doubtful legal validity or insufficiency. It also contains able statements of the general law upon such subjects as markets, burials; the common law as to danger from fires, public conveyances, etc. We venture to think that the reported decisions upon the questions of what constitutes a "drain" and a "sewer," such as *Travis v. Utley* [1894] (1 Q.B. 233); *Seal v. Merthyr Tydfil Urban Council* (67 L.J. Rep., Q.B. 37), which have occupied the Courts up to the House of Lords, might have been discussed in both works under review at greater length than would appear to have been thought desirable by the authors.

We may also express a doubt, whether, in framing the bye-law requiring drivers of hackney carriages knowingly conveying a corpse, to notify the fact to the sanitary inspector, the Local Government Board was carrying out the regulating the conduct of the driver of the carriage (Mackenzie and Handford, vol. i. p. 274).

The learned authors, of necessity, were unable to refer to the recent decision of *West v. Corporation of West Ham* (108 L.T. Notes of Cases 176) upon the question who is liable for the penalty for a continuing offence under section 158 of the Public Health Act, 1875, in the case of a building, infringing the provisions of a bye-law as to execution of a work, or *Uckfield Rural District Council v. Crowborough Water Co.* [1900] (68 L.J. Rep., Q.B. 1009), as to the non-exemption of buildings of a waterworks company from the requirements as to depositing plans with the authority, inasmuch as these decisions were subsequent to the date of the publication of their book.

WM. PERCY PAIN.

## VI.—IN MEMORIAM: BARON PENZANCE.

THE Right Honourable James Plaisted Wilde, Baron Penzance, was the second son of Mr. Edward Archer Wilde, a leading solicitor in the City of London, and Mary, eldest daughter of William Norris, M.D., and was a nephew of Sir John Wilde, LL.D., for many years Chief Justice of the Cape of Good Hope, and of Sir Thomas Wilde, who was successively Solicitor- and Attorney-General from 1839 to 1841, in Lord Melbourne's Administration, and subsequently Chief Justice of the Common Pleas, and who was created Lord Truro in 1850 on succeeding Lord Cottenham as Lord High Chancellor. He was born in London on July 12, 1816, was educated at Winchester and at Trinity College, Cambridge, and graduated B.A. in 1838, and M.A. in 1843. On leaving the university he entered the Chambers of Mr. Barnes Peacock (the late Right Honourable Sir Barnes Peacock), who was reputed to be one of the ablest and acutest of junior counsel at the Common Law Bar, and in after-years Lord Penzance would often recur to the advantages he had derived from having commenced his legal studies under the guidance of so erudite a lawyer, and of such an expert in the art of special pleading.

On November 22, 1839, he was called to the Bar at the Inner Temple, and joined the Northern Circuit, and in 1840 was appointed Junior Counsel to the Excise and Customs. From 1840 until Sir Thomas Wilde was promoted to the Bench in 1846, he assisted him in his cases in Chambers, and thus acquired a knowledge of the principles of Commercial Law, which led to his being retained in the City and on circuit, in commercial cases. Having attained to a large junior practice in London, and at Liverpool and York, the assize towns on his circuit, which he regularly attended, he

took silk in 1855, and was appointed Counsel to the Duchy of Lancaster in 1859.

After taking silk he rapidly acquired a leading business in London and on circuit, especially in commercial and patent cases, and by the quiet, logical, clear, and persuasive manner in which he presented his cases to special juries, he was remarkable for his success in securing verdicts.

As an illustration of Mr. Wilde's success as a leader at the Bar, I will refer to two actions in which he was engaged shortly before his promotion to the Bench, which attracted much attention at the time. The circumstances leading up to them were as follows: An American-owned ship, the *Sierra Nevada*, laden with a cargo of guano belonging to Messrs. Gipps & Co., arrived at Liverpool in April, 1855, and was ordered by the Harbour Master to enter the Wellington Dock. Whilst entering it at high water her port bow ran on a mud-bank that had silted up against the sill of the dock, and there stuck so as to prevent the dock gates being closed. On the tide going down, her bow being still on the mud-bank—and the after-part of the vessel across the basin of the dock—the weight of the cargo broke the ship's back, with damage to the cargo. This led to two actions against the Harbour Board for damages; one by Messrs. Gipps, as owners of the cargo, the other by Penhallow and others, as owners of the ship. Mr. Wilde led for the plaintiffs in both actions. The action for the owners of the cargo was tried at the Liverpool Assizes in March, 1859, when a verdict was returned for the plaintiffs, which was ultimately upheld on a motion for a new trial. The action for the shipowners, Penhallow and others, was tried before Chief Baron Pollock, and a special jury, in December, 1859, in the Court of Exchequer. The trial lasted five days. The issues were (1) whether the vessel was in fact stopped by the mud-bank; (2) whether the Harbour Board had means of knowing the state of the dock, and were negligently ignorant of it. The

case for the Dock Board was that the vessel was stopped through some defect in it, and that as the mud-bank was invisible, and as the Board and their servants were unaware of its existence, even if it did stop the vessel, they were not liable in damages. The jury found for the plaintiffs on both issues.

In the first case there was a demurrer to the pleadings, on which two questions of law were decided in favour of the plaintiffs. (1) "That a Public Body constituted like the Harbour Board was responsible for the negligence of its servants ; (2) that a duty to know coupled with a means of knowing is equivalent in law to knowing." Judge Vernon Lushington, Q.C., who was Mr. Wilde's junior in the last case, writes to me that he well recollects his brilliant performance at this trial, and that he considered that it was his good generalship and brilliant reply that got the verdict ; and that in his mind (and as a member of his circuit he had opportunities of judging of his powers) he was one of the very best *Nisi Prius* Counsel he had heard, and that, added to all his other qualities, he had a vein of pleasant humour which took with juries mightily. After the conclusion of the trial, the American owners of the ship presented him, in recognition of his services as their counsel in the case, with a handsome silver inkstand, which was much prized by Lord Penzance at the time and in after-life.

Mr. Wilde contested Leicester in 1852, and Peterborough in 1859, as a Liberal candidate, but was unsuccessful in both contests.

In March, 1860, on the death of Baron Watson, he was appointed a Baron of the Court of Exchequer, then presided over by Chief Baron Pollock, with Barons Martin, Bramwell, and Channell as colleagues ; and upon the death in August, 1863, of Sir Cresswell Cresswell, the first judge appointed under the Probate and Divorce Acts as Judge of the Court of Probate, and Judge-Ordinary of the Courts for Divorce

and Matrimonial Causes, Baron Wilde was selected by Lord Palmerston, the then Premier, to be his successor.

The duties which devolved on Sir James Wilde on this promotion were arduous and beset with difficulties, in part owing to his predecessor having died before he had completed the work he had so ably begun of adapting the rules of practice in the Courts of Doctors' Commons to the alterations in the practice contemplated by the Legislature on the establishment of the New Courts, and in part to the arrears of cases standing over for hearing at the time of Sir Cresswell Cresswell's death.

It would be impossible for any one to form an accurate estimate of the difficulties in which both Sir James Wilde and his predecessor were involved on the assumption of their functions as Judge of these Courts, without some reference to the practice of the Old Courts, whose jurisdiction in matters of Probate, and of granting Letters of Administration, and in Matrimonial Suits had been transferred to them.

Prior to the passing of the Probate and Divorce Acts, the principal Probate Court in England,—owing to the rule that when a person died leaving *bona notabilia*, i.e. 100s. or upwards in two or more dioceses in the Province of Canterbury, it was necessary that a grant of probate or of letters of administration should be taken out in that court, and the principal Court of First Instance in Matrimonial Causes had for long been the Consistory Court of London, by the act of parties; for although by the Statute of Citations, 23 Henry VIII. cap. 9, it was enacted that persons should not be cited out of their dioceses except in cases mentioned in the Statute, it was held by the Common Law Courts, and by the Arches, that the Statute was meant for the benefit of the subject, and that if the party cited waived that privilege by appearing and submitting to the suit, he or she was bound to the jurisdiction. It was a common practice, therefore, for a party resident in any part



of England, before commencing a matrimonial suit to take up a temporary residence in a parish in the diocese of London, and then to extract a citation from the Consistory Court of London, describing himself as of that parish, and upon the party cited appearing and not objecting to the jurisdiction the suit proceeded. The advantages of adopting this course were : (1) That it secured the suit being tried before a judge accustomed to, and well able to determine, such suits (the judges of the court for the century preceding the Divorce Act having been Sir W. Wynne, Lord Stowell, Sir Christopher Robinson, and Dr. Lushington) ; (2) that it enabled them to secure the assistance of advocates and proctors in Doctors' Commons for the conduct of the case ; (3) celerity in the progress of the suit.

The principal changes made in the practice of the new courts under the Probate and Divorce Acts were : (1) The substitution in suits, of oral evidence given in court for written evidence taken down by an examiner out of court ; (2) the option of trying issues of fact on the application of either party to a suit by a jury instead of by the judge alone ; (3) the promulgation from time to time, by the judge, of rules of practice so framed as to adapt the Doctors' Commons practice to the practice contemplated by the above Acts.

Rules for each court framed, under the supervision of Sir Cresswell Cresswell, by the registrars, who had been in practice in Doctors' Commons, were promulgated by him in January, 1858. But it was provided by the Acts, that when a case arose to which the new rules were inapplicable, the practice of the old courts was to prevail ; and it soon transpired that from time to time cases, or nice points in cases, arose not covered by the new rules, which necessitated the Court having recourse to the old practice. To do this involved considerable research in the court books of the Prerogative Court, and of the Consistory Court of London, for orders made by the Courts, and the examination of proceedings

which had been filed in those Courts for precedents, there being no Reports of Cases heard in the Prerogative Court prior to the publication of Dr. Phillimore's *Reports*, commencing 1808, nor any of Matrimonial cases prior to Dr. Haggard's publication of Lord Stowell's *Judgments in the Consistory Court of London*, commencing 1789, with the exception of Prerogative and Matrimonial Cases reported in Dr. Lee's *Judgments*, extending from 1752 to 1758, and the latest authentic book of practice being Oughton's *Ordo Judiciorum*, published in 1728, since which date various alterations had been made in the practice of the Courts by orders of the judges.

Sir James Wilde, shortly after taking his seat on the Bench in the Probate Court, had evidently come to the conclusion that the trite saying, "that it is a very dangerous thing to set aside a will," must not be pushed too far, and in practice held, that whenever a death-bed will was without just cause at variance with the previous testamentary dispositions of the testator, or unjust to members of his family having natural claims on his testamentary bounty, the disappointed parties should have an opportunity afforded them of laying their case fully before the Court, and in such cases it was his invariable custom to listen with marked patience to everything that could be urged on either side, and to probe the evidence for and against the validity of the will with the greatest care.

He also sanctioned, in aid of justice, the introduction of pleas traversing the validity of the residuary clause, or of a clause containing a specific legacy in a will, on the ground • that it had been inserted by undue influence or through fraud, or that the testator did not know or approve of contents of the particular clause containing the bequest when he executed the will, for the purpose, if the plea was established, of excluding the bequest from the probate. Whenever there was a reasonable ground for contesting the validity of a will,

if the party opposing failed in the suit, his practice was either not to condemn him in costs, or to allow him costs out of the estate according to the circumstances of the case.

The rules that ought to guide the court on the question of costs came under the consideration of Sir James Wilde within a month of his taking his seat in the court in *Mitchell v. Gard* (3 Swab. & Tris. 278), in which he deduced the two following rules for guidance. First, if the cause of litigation takes its origin in the fault of the testator, or those interested in the residue, the costs may properly be paid out of the estate; secondly, if there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will, or the capacity of the testator, or to put forward the charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent. "I am aware," he proceeded to say, "that there are many cases to be found in which costs have been granted out of the estate under circumstances different from those I have predicted. It is hard to extract any general rule from the cases. It is of high public importance that doubtful wills should not pass easily into proof by reason of the cost of opposing them. It is of equal importance that parties should not be tempted into a fruitless litigation by the knowledge that their costs will be defrayed by others."

On April 6, 1869, Sir James Wilde was elevated to the peerage. He took the style and title of Baron Penzance, in the county of Cornwall. His elevation was announced in the following appreciative terms in the *Law Journal*:—

"The elevation of Sir James Plaisted Wilde, who has held the office of Judge-Ordinary of the Probate and Divorce Court since July, 1863, to the peerage will give unqualified satisfaction to the legal profession and to the general public. There is no judge on the Bench whose conduct can be so easily criticized and so clearly appreciated by the suitors,

because the principles and the procedure of the Courts of Probate and Divorce are perfectly intelligible to the non-professional portion of the community. Indeed, the Judge-Ordinary of the Divorce Court needs rather the possession of great moral qualities than high legal attainments, and we are unable to call to mind the name of any judge who, in temper, discretion, and good sense, has excelled Sir James Wilde. Old men can remember the time when judges seemed to forget the very existence of the suitors, and to imagine that a cause or an argument was a mere forensic struggle, in which judges and Bar had to take part for the better sharpening of their wits, or the better elucidation of the law. Sir James Wilde has taken precisely the opposite view of the duty imposed upon a judge. He has kept his attention steadily fixed on the suitor, and he has even laid himself open to the charge of creating or encouraging irregularities in practice by his unfailing anxiety to save expense and do justice. We need not here enlarge on his legal acumen, his elegant diction, his lucidity of expression, and his accurate perception of human character. The honour of the peerage has never been more fairly earned by a judge."

Some time after Lord Penzance's elevation to the peerage those who practised in the Court were alarmed by a current report that he was to be promoted to an appellate judgeship under a contemplated change in the Appellate Courts, and it was with the liveliest satisfaction that they learnt that his reported removal would not take place. The following remarks, which appeared in the *Law Journal* at the time, were in entire accord with the feelings and opinions of the practitioners in his Courts:—

"For our part, we most strongly deprecate any further weakening of the judicial staff in the Superior Courts. With regard to the intended removal of Lord Penzance from the Probate and Divorce Courts, we must say that we deem it to be almost a national calamity. Some day, in the course of

nature, his lordship's place in that Court must be vacated, but as long as he is alive and well, what reason or sense is there in taking from that office a judge who has discharged its peculiar duties to perfection? It is difficult to overrate the extent to which the reputation, feelings, and civil rights of the community are affected by the due administration of the law of divorce; and we take leave to doubt the wisdom or fairness of a change which would take the care of these interests out of the hands of a judge in whom everybody places unbounded confidence, in order to place them in the care of some untried man. We ought not, perhaps, to say anything about the interests of the profession in a matter of this kind, but we do not speak without good reason when we declare that the practitioners in the Probate and Divorce Courts will view his lordship's removal with a feeling akin to dismay."

Towards the end of July, 1872, Lord Penzance, owing to the long-continued strain of heavy work in Court and Chambers, was attacked with severe pains in his head, accompanied with great prostration of the nervous system, which rendered it necessary for him, by the advice of Sir William Gull, to have complete rest from all mental labour for a time. At the close of the Long Vacation he had very considerably rallied, but not sufficiently so to enable him to resume his judicial duties in the ensuing term. Sir William Gull, however, thought that after a year or more of complete rest he might regain his health, adding that he did not think that he could ever, without great risk, be able to undertake any public duty requiring continuous and arduous mental tension. But Lord Penzance himself felt that if he could procure a substitute to take his place on the Bench for a twelvemonth, he would be then able to resume his judicial duties. With this view he communicated with Sir Montague Smith, who had recently resigned his judgeship in the Court of Common Pleas, and asked him if he would, subject to Mr. Gladstone's sanction as Premier, consent to sit for him in the Probate and

Divorce Court for a twelvemonth, adding that when he was in any doubt as to the practice of the Court or otherwise, on his communicating with him, he would be glad to give him his assistance. Sir Montague Smith having kindly assented to the proposal, Lord Penzance submitted it to Mr. Gladstone, who declined to sanction it, and informed Lord Penzance that he should expect him to resign. Lord Penzance thereupon inquired what pension would be assigned to him were he to resign ; he having two and a half years longer to serve for his full pension. Mr. Gladstone's reply was, that on sending in his resignation the amount of the pension to be awarded to him would be taken into consideration. Lord Penzance's rejoinder was, that this being so, he should not send in his resignation, and being unable to appear in his Court in the ensuing term, on the reassembling of Parliament he would place the matter before the House of Commons for its consideration. In the result, Mr. Gladstone consented to a warrant being handed to Lord Penzance, securing to him the full pension of £3500 a year, in return for which he handed to the Treasury an instrument of resignation. The above facts were personally communicated by Lord Penzance to Dr. Spinks immediately after his retirement from the Bench, with an expression of deep regret that, owing to Mr. Gladstone's refusal to sanction his arrangement with Sir Montague Smith, he should have been prevented, on being restored to health, from resuming his seat in the Old Courts. Dr. Spinks told me, *recenti facto*, of Lord Penzance having made the above communication to him, and Lady Penzance confirms its accuracy.

I have felt it to be due to Lord Penzance's memory to refer to the circumstances attending his resignation, as after his recovery, observations were made to his lordship's prejudice at the Bar, that there was no reason why he should not have arranged to remain on the Bench for a sufficient length of time to entitle him to his full pension.

The following extract taken from the *Law Journal* contains a faithful contemporary expression of the opinion of the legal profession and of the public of the services that Lord Penzance had rendered to his country during the ten years that he had presided in the Probate and Divorce Courts, and of the loss that they sustained by his retirement from these Courts :—

“We have so often expressed our opinion of Lord Penzance’s success as a judge, that we do not deem it incumbent on us to enter upon any general retrospect of his lordship’s career. It is sufficient to say that Lord Penzance, following Sir Cresswell Cresswell, has completed the edifice, of which his learned predecessor did more than lay the foundations, and that, thanks to the genius of these two men, there is now a Court which, in its principles, practice, and mode of business, is an example worthy of the highest admiration. The public had very properly an extraordinary confidence in Lord Penzance. The adjustment of matrimonial suits or testamentary controversies is not the less arduous, because they are of the class of quarrels which evoke the most powerful and corrupt instincts of human nature, yet Lord Penzance very rarely encountered a suitor who had not sublime faith in his lordship’s discretion and fairness.

“But if the public has lost a trusted friend, the Bar has suffered in no small degree. If anything could render a disagreeable class of business less noxious to the better feelings of practitioners, it was the courtesy, dignity, and patience of his lordship. On the unruffled surface of that Court it was impossible to detect even a ripple of acrimony between the Bench and the Bar ; and how business was facilitated and the Bar assisted by that state of things every one who has encountered tempestuous judges can appreciate. It is wearisome to retire from the discharge of useful duties at an early age by compulsion of ill health, but we hope that his lordship will derive some comfort in his misfortune, from the respect and

admiration with which the whole community, learned and unlearned, takes leave of him."—7 *Law Journal*, Legal News, 743.

The remarks of the daily Press, without exception, in announcing Lord Penzance's retirement, were full of expressions of admiration of the manner in which he discharged his judicial duties, and of regret at the cause which was supposed by the outer world to have necessitated his permanent retirement from the Bench.

In his reported judgments in the Court of Probate there will be found luminous and exhaustive disquisitions on various points of testamentary law. The first case tried before him—*Lister v. Smith*—was a remarkable one. The question raised in it was whether a duly executed codicil, testamentary on the face of it, proved by parol evidence to have been executed by the deceased as a sham codicil, without any intention that it should affect the dispositions of his property after death, was entitled to probate. The codicil was executed under the following circumstances :

A member of the testator's family occupied one of his houses, which he was desirous that she should give up. This she had refused to do. He had left to the daughter of this woman a bequest in his will. By a codicil to it he revoked it. He executed the codicil in the presence of his brother, to whom he gave it, with express directions not to part with it, and that it was to operate in no event to revoke any of the bequests in his will, but merely to be used for the purpose of frightening the mother into giving up the house. The jury having found on cogent evidence that the codicil was executed as a sham and a pretence, and never seriously intended as a paper of testamentary operation, Lord Penzance refused to grant probate of it, on the ground that there was an absence of the *animus testandi* in the testator at the time of its execution, the presence of which was essential to entitle a testamentary paper to probate.



Another remarkable case decided by Lord Penzance was that of *Smath v. Tebbitt*, in which it was shown that a Mrs. Thwaytes, the widow of a tea-merchant in the City, died on April 8, 1866, leaving a fortune of about £500,000. By her last will, dated March 2, 1866, she bequeathed legacies amounting to £45,000 to children of her sister, Mrs. Tebbitt, who was her sole next of kin, and the rest of her property to strangers in blood. The validity of the will was disputed by Mrs. Tebbitt on the ground, that from 1833 up to the time of her death in 1866, she laboured under numerous insane delusions such as constituted her mind generally unsound. Some of her delusions being—that she was the Third Person of the Trinity; that the Creator could not do without her; that she was above God seven degrees; that she sent the cholera and the influenza throughout Creation, and that it had to go through her first; that she had power over all creation; that the Tebbitt family were doomed to everlasting perdition; and that she had had a revelation from heaven to cut off her sister, Mrs. Tebbitt, root and branch. She also had her drawing-room in her London house in Upper Hyde Park Gardens decorated and furnished by Messrs. Gillow, at the expense of £15,000, to be used for no other occasion than for the Judgment Day, in the middle of which she was to sit on an ottoman to judge the world.

In support of the will it was submitted, that as her delusions merely related to religious subjects they ought not to invalidate the will.

Upon this Lord Penzance, having remarked that some of her ideas were that she was the Bride of Christ—that she was born anew in some mysterious sense, beyond a merely spiritual regeneration—proceeded: “I can conceive it just possible for these ideas to have been bred in a mind not very highly educated or robust, acted upon by an excitable, nervous, enthusiastic temperament. But will anything we know of the natural and healthy working of the human mind

extend to the conception of a false identity, such as that involved in her being one of the Holy Trinity, or the Virgin Mary? Or, still further, to her assumption of the Divine attributes in the preposterous expectation that she should sit in judgment on the rest of mankind—culminating, as it did, in the puerile bathos of the London drawing-room, with its velvet and silk, as the scene of her future glory? Religious and fanatical enthusiasm will account for much, but did it ever stretch so far and stoop so low?"

The defendants having proved that these delusions had existed from 1833 to 1864, but having given no evidence of their existence between the last date and the date of the will, Lord Penzance held that a diseased state of mind once proved to have established itself, would be presumed to be continued, and that the burthen of showing that health had been restored fell upon the plaintiffs, who had asserted it, but had produced no sufficient proof for that purpose; and, not being satisfied that the deceased was of sound mind when she executed the will, his lordship pronounced against it.

In *Charter v. Charter*, Lord Penzance held that where a testator appointed as his executor and devisee his son Forster Charter, having no son of that name living at the date of the will, but two sons named William Forster Charter and Charles Charter, the Court being satisfied that the name Forster Charter was inserted in mistake, parol evidence of the circumstances under which the testator wrote the will, and of the position of parties about him, and also on consideration of the contents of the will itself which of the two sons the testator intended to designate as his executor, was admissible, and that upon this evidence it was Charles Charter who was denoted by the will.

From this decision there was an appeal to the House of Lords (7 L.R. Eng. & Ir. Appeals, 364), when Lords Chelmsford and Hatherley held that a partial designation of a Christian name could not be said to occasion any doubt

as between the son whose second Christian name was Forster and the son who did not bear the name of Forster, and that therefore parol evidence was inadmissible, and that William Forster Charter was the executor and devisee denoted. But, Lord Chancellor Cairns and Lord Selborne held that it being clear that the name Forster Charter was written in mistake, the Court had a right to ascertain all the facts which were known to the testator at the time he made the will, and thus to place itself in the testator's position in order to ascertain the bearing and application of the language he used in the will, and on this evidence held that Charles Charter was the executor and devisee denoted. The judgment of the Court below was thereupon affirmed.

During the passage through Parliament of the Public Worship Act, 1874, there being a difficulty in securing a judge to preside in the Court to be established under the Act, Lord Penzance intimated to Archbishop Tait that he was restored to health and was now desirous to have some regular judicial work, and quite able to undertake it, and would be prepared to undertake the duties of judge to be appointed under the Act. He was accordingly offered the appointment, on the passing of the Act, by Archbishop Tait and Archbishop Thomson, on the ground of his having proved himself to be an able and an accomplished judge. He accepted it, and his judgments during his term of the office have been generally approved and affirmed by the Judicial Committees of Her Majesty's Privy Council.

Lord Penzance died on December 9, 1899, at Eashing Park, Godalming, where he had resided for many years, in the eighty-fourth year of his age. In 1860 he married Mary Pleydell-Bouverie, daughter of the third Earl of Radnor, who survives him without issue.

Upon the Editor requesting me to write an article in Memoriam of Lord Penzance, I acceded to his request with pleasure. I have written of him as I found him, and in case

it may be supposed that I have written of him as I have done under the influence of private friendship, I should state that I never once met him in private life, and that the only communications I had with him in private throughout the ten years that I practised in his Court, during the first six of which I was one of the Court reporters, arose from my being reporter of his judgments, and a junior counsel in frequent practice before him.

After his retirement from the Bench I sometimes casually met him, when he invariably gave me a kindly welcome, and made inquiries after the other members of his old Bar.

T. H. TRISTRAM.

## VII.—CURRENT NOTES ON INTERNATIONAL LAW.

### The Transvaal War.

IN the swift march of recent events, discussion as to the existence of a genuine *casus belli* with the Transvaal has, for the time, become a little stale and unprofitable. But when the history of the affair comes to be written, the point will certainly have more than academical importance. Professor Westlake's pamphlet \* is, therefore, of more than ephemeral interest. The necessity for compressing the subject within the scope of one lecture has resulted in a slenderness of treatment, inappropriate to the magnitude of the question at issue. The author's eminence as an international jurist, and the fact that he has acted as legal adviser to the Government on concrete points involved, renders his survey of the situation deserving of more than passing attention. The conclusion at which Professor Westlake arrives is somewhat curious.

\* The Transvaal War. A lecture delivered in the University of Cambridge on Nov. 9, 1899, by J. Westlake, Q.C., LL.D. Second edition (University Press).

It is best indicated at p. 20 of the pamphlet. After a cursory examination of the possible "legal" grounds for British warlike intervention, *i.e.* (1) the alleged breaches of the London Convention; (2) the Uitlanders' claims of grievances to individuals; and (3) the franchise question, Mr. Westlake expresses the view that none of these things "have been such as could be made a cause for war. They have either been such as we could not make at all against a stronger foreign country, in which the same circumstances occurred, or they have been claims for which, the facts as regards them being disputed, the true remedy would have been arbitration." On the other hand, he strongly contends that the exigencies of high policy clearly justified war. "It does seem to me," he says (p. 20), "that there is very great reason for contending that it (the Transvaal Government) has systematically acted in such a manner as to constitute a grave danger, which entitled this country to throw the letter of the Convention aside, and to demand relief from a situation which had become intolerable." In support of this view he lays special stress upon the persistent endeavours of the Transvaal Government to infringe the spirit of the London Convention—its ostentatious coquetry with Germany—its continuous policy of commercial hostility to the Cape Colony, culminating in the threatened closing of the Vaal Drifts in 1895, and its excessive increase in armaments both before and since the Jameson Raid.

The weak point in Mr. Westlake's reasoning seems to us to be his attempted differentiation between the legal and political considerations at issue. It is very difficult, and in these days somewhat impractical, to make such a distinction. The old theory that International Law concerns itself, amongst other things, with the grounds of justification for war, is hardly consistent with the modern view of the nature of that science. We may surely relegate such a theory to the

philosophy of past times, when the sanctity of International Law was attributed to a *jus naturale*. The adequacy of a cause of war must ultimately be a political question, with, of course, moral aspects.

We are disposed to think that Mr. Westlake underrates the question of "redress for grievances to individuals." This was not merely (or even mainly) a question arising on the Convention of 1884, but rather one connected with the obvious right and duty of a State—as well on grounds of expediency, as of morality—to protect its subjects in a foreign State from gross and persistent oppression. The history of the nineteenth century is full of instances of intervention in such cases. We fail to see that the justification for such intervention is lessened, as Mr. Westlake seems to suggest, because on grounds of obvious political expediency, we might well, in dealing with a great Power, be more loth to carry the question to the fighting point, than in quarrels with weaker States. And why, again, should "the true remedy have been arbitration"? From the point of view of International Law, we can recall no precedent in which arbitration has ever been suggested as a means of settling such an accumulation of grievances, coupled with what Mr. Westlake admits to have been a general political "situation which has become intolerable." The ideal beauty of the arbitration principle can hardly blind one to its inapplicability to such a unique case. We fear that even article 16 of the Act of the Hague Conference hardly contemplated such wholesale arbitration of differences as the Transvaal question involved. It would have necessitated a permanent tribunal sitting *de die in diem* to check the daily diplomacy, executive government, and administration of justice in the Transvaal. We are disposed to think that any arbitration on concrete points in dispute must in the end have resolved itself into the kind which Mr. Westlake thinks was intended by President Krüger in his dispatches (see p. 3), and which could not, under the

circumstances, have been admitted by us, *i.e.* "arbitration on the general interpretation of the relations" of the two Governments.

The distinction between "legal" and "political" differences with reference to arbitration was admirably pointed out by Mr. Westlake, in his article in the *International Journal of Ethics* for October, 1896; but there is a real difficulty in accurately discriminating between such differences in actual controversies, and in none more than in this dispute with the Transvaal.

With most of Professor Westlake's remarks on the London Convention we cordially agree. The attempt to interpret it "under the assumption of a *vague* suzerainty" has been most unfortunate. That in a technical construction of the Convention, some sort of "suzerainty" was retained, is indisputable, but the term is an elastic one, and reliance on it in practical politics, in the presence of so many more concrete and substantial issues, has proved somewhat futile and perhaps a little aggravating. From the point of view of a lawyer, the Convention has always struck us as a most unhappily framed document. If any real intention to safeguard the rights of future British settlers in the Transvaal animated the framers of the treaty, they seem to have sadly lacked either ordinary prescience, or skill in draftsmanship, or both. Article 14, which alone purports to carry out any such intention, seems to us to have altogether inadequately provided for most of the serious questions which have since arisen. We confess that on the ordinary principles of legal interpretation of treaties, it would seem most difficult to construe, as breaches of the *letter* of the Convention, either the Dynamite concession, the closing of the Drifts, the refusal of the Franchise, the delay in submitting treaties for the Queen's approval, the Education question, the exclusion of foreigners from acting

as jurymen, the Public Meetings Act, or the abuses of the Liquor Laws.

That all of these and many other grievances are either breaches of the *spirit* of the Convention, or matters which (to use Mr. Westlake's phrase) made the political "situation intolerable," it is difficult to dispute. When the war is over, we shall, perhaps, have a clearer appreciation of this fact than we have at present.

J. M. G.

### Contraband of War.

Of the many questions of International Law brought into prominence by the present South African War, perhaps the most important, affecting neutrals, owing to the geographical position of the Boer Republics, is that of Contraband of War. As Portugal is the only neutral country which is coterminous with the Transvaal and Free State (regarding them as one), and the Portuguese port of Delagoa Bay is both geographically and commercially the natural means of communication between the Transvaal and outside, it is obvious that the nature of the trade which goes to this port is one of great importance to both belligerents, and that the neutral country which owns it is under a more than usually strict obligation to them as regards its use. Being a neutral port, Great Britain cannot blockade or seize it, nor can her warships interfere with any neutral ships carrying cargo to that destination unless that cargo can be considered as contraband of war. Two questions accordingly arise in this state of circumstances: (1) What articles going to Delagoa Bay can be treated as contraband? (2) What are the duties of Portugal in respect of contraband articles when landed at that port?

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As regards the first point, the two essentials of contraband are (a) a hostile destination; (b) a nature applicable to



**warlike use.** The fact that the destination of the articles is primarily a neutral port (as must of necessity be the case with shipments intended for the Transvaal) does not prevent their being considered as contraband if they are going with a certain or highly probable destination to military use (*e.g.* to a hostile fleet in a neutral port), on the authority of Lord Stowell and Story; but there is no doubt that the rule of the British Prize Courts has been that the destination of the ship is conclusive of the destination of the goods on board her, and that if the destination of the vessel be neutral, the destination of the goods on board her must be considered neutral, notwithstanding it may appear from the ship's papers or otherwise that the goods themselves have an ulterior hostile destination to be obtained by transshipment, overland conveyance, or otherwise. The only exception to this is in the case of a continuous voyage, *i.e.* one where a ship is destined ostensibly to a neutral port, while she really intends, after touching or even landing and colourably delivering over her cargo there, to proceed with the same cargo to an enemy's port, when her destination is considered hostile throughout. This rule was applied originally by British Courts to cases of neutral ships engaged in a colonial trade of a belligerent which was not open to them in time of peace, and the cargo was confiscated if the ship was actually *in delicto*, *i.e.* on her direct voyage to the hostile port, although Lord Stowell also held that where contraband has been carried on a distant outward voyage with false papers and false destinations, the return cargo, being proceeds of the outward cargo, is liable to condemnation. The American Courts during the American Civil War extended this doctrine of continuous voyage to any case where goods of a contraband nature were in transit from one neutral port to another, if it could be inferred that at the latter they were intended to be transhipped for a hostile port or to be conveyed by land or sea to hostile territory for the use of hostile forces; although an English Court, in a case on a policy of insurance

on goods so condemned by the American Courts, held they were not contraband. This doctrine has been adversely criticized, notably by Sir Travers Twiss in 1877, in this Magazine (4th series, iii. 31), but while perhaps it might operate harshly if not kept within due limits, it seems to be in accordance with the spirit of Lord Stowell's decisions, and to be a principle which may fairly and justly be applied in a case like the present, where the one belligerent has no sea-ports, and the ordinary rule would allow it to draw its supplies of war unchecked through the avenue of a neutral port. It will not be surprising if the British Government adopts the American view under these circumstances.

The nature of the cargo carried in the neutral ship is the next consideration. With regard to munitions of war, such as ammunition, guns, saddles, horses, etc., there can be no doubt at the present day that any Prize Court would condemn them if intended for the enemy ; but the question of provisions which has been raised by the recent seizure of flour is one which has given rise to much controversy among jurists, and difference of practice between nations. Lord Stowell, however, and Story both state the modern established rule to be that, generally, provisions are not contraband, but may become so under circumstances arising out of the particular intention of the war or the condition of the parties engaged in it (*The Jonge Margaretha*, 1 C. Rob. 194 ; *The Commercen*, 1 Wheat. 391). The treaty between the United States and Great Britain in 1794 bears out this view, although the joint commission for settling claims under this head between the two nations gave full indemnity to owners of American provision cargoes, destined for French ports not invested, which were brought in by British cruisers under the Orders in Council. In 1885, during her war with China, France declared that she would treat as contraband shipments of rice destined for any port

north of Canton, on the ground of the pressure which this would put on the noncombatant Chinese population as well as its army ; but Great Britain refused to recognize this as binding, and no case arose to test it. Consistently with our general practice, the better course in the present case would seem to be to treat as contraband only such food-stuffs going to Delagoa Bay as are not consigned thither in the ordinary course of trade so as to become part of the stock of the country : and the decision of the Government to treat as contraband only such food-stuffs as are shown by the ship's manifesto to be intended for the enemy is politic as not extending beyond the previous British and American practice. As regards persons going to join the Boer service when found in neutral ships, the best practicable rule seems to be that, if the neutral ship is not exclusively or chiefly employed in carrying them, and they have not contraband with them, they are not of the nature of contraband, and neither they nor the ship can be detained.

As regards the transport of contraband through Portuguese territory to the Transvaal, it may be said to be the duty of Portugal, at any rate, to prohibit this officially, in the same way as during the Franco-German War of 1870, Switzerland refused to allow Alsatians enlisted for the French army, though travelling without arms or uniforms, to pass through her territory, and England prohibited vessels from sailing from her ports with coal directly consigned to the French fleet in the North Sea ; and also to warn her subjects to abstain from so doing, as Prussia did in the Crimean War with regard to contraband passing through to Russia. Official laxity which will enable acts of this kind to become a practice would be a breach of neutrality, as virtually allowing neutral territory to be made a base of operations for one belligerent ; and the reported decision of Portugal not to

allow any foreigner to pass from its territory into the Transvaal without an official permit is a sign that she recognizes her duty in this respect.

The reported refusal of the German Government to allow the sale of munitions of war in its territory to either belligerent is, in principle, a more correct view of the obligations of neutrality than that held by Great Britain and the United States, which allow sale of contraband to both belligerents, from "a leaning to the freedom of commerce;" but the practical result is the same.

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#### Domicile.

The decision of the House of Lords in *De Nicols v. Curlier* brings our law into line with the view supported by the balance of authority among jurists, and the tendency of former English and Scotch decisions with regard to the question of the effect which a change of domicile has upon the personalty of a husband acquired in that new domicile, where there was no express marriage contract regulating the property of the husband and wife. Two domiciled French persons married in France, and afterwards came to England. The husband became naturalized and died, leaving a large fortune acquired in England, and by a will made in English form made provision for his wife and only child, a daughter. The wife claimed that by French law she was entitled to half the movable property acquired in England. Kekewich, J., held in her favour, and was reversed by the Court of Appeal, which held that such after-acquired property was governed by the law of the actual domicile of the husband, but his decision has now been restored by the present judgment.

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The view of the Court of Appeal had the weight of Story's approval and the support of some American decisions; but the

present judgment is in conformity with high judicial decision on the Continent of Europe, and the opinions of English writers, and proceeds on the principle that the tacit contract entered into by the parties at marriage, that the law of the country of their matrimonial domicile should govern their property acquired during marriage, ought not to be altered at the will of one party to it, the husband, without the consent of the other. The members of the court variously base their judgments on the grounds that, by French law, the wife acquired a proprietary right in any property, present or future, that might belong to herself or her husband, and that the provisions of the French code in this respect were equivalent to an express contract between the parties, which, beyond dispute, would not have been affected by any subsequent change of domicile. In a former case (*Lashley v. Hog*), the House had held that, where two English domiciled persons married in England, and afterwards the husband became domiciled in Scotland, the law of Scotland governed the rights of the wife over the property; and in the present case this decision is distinguished on the ground that the wife obtained no proprietary right by the law of the matrimonial domicile, and when the parties became domiciled Scotch spouses, the property which was not affected by any previous complete and irrevocable right, would properly be distributed by Scotch law.

The principle now adopted seems to be in accordance with American decisions, that rights, vested by the law of the original domicile are not diverted by change of domicile; but it has not the convenience of being the same as that applied in questions regarding the status of the married parties, such as divorce (although such questions as judicial separation, or restitution of conjugal rights can be decided by the court of the country where the parties reside), and testamentary power,

viz. that the law of the actual domicile governs. In the case of immovable property acquired after a change of domicile under the above conditions, it seems well settled by English and American law, that the *lex situs* will determine the rights of the parties over it, although French law and many continental jurists make no difference in this respect between immovable and movable property.

Another recent case of interest in this connection is that of *Loustalan v. Loustalan*, decided last year in the English Probate Court. There a testatrix, a French subject, who had lived in England as companion to a widow, and had made a will in accordance with French law, which she deposited with a notary in France, married in London a Frenchman domiciled in France, and carried on business with him in London till her death. The plaintiff claimed probate of the will which she had already established in France, and had been put in possession of the estate as universal legatee, and contended that the English Probate Court should, sitting as a French Court, apply French law to the will, under which a subsequent marriage does not revoke a will; while the defendant, who had obtained letters of administration in England prior to the proceedings in France, of which he had had no notice, contended that the law of the husband's domicile according to French law (*i.e.* the English law) should apply. The Court decided that the husband's and wife's domicile, according to the law of his domicile (France), was in England, where he had his principal and only establishment of business, and where he resided in order to escape the penalty of a conviction in France; but held that, while the parties intended that English law should regulate their contractual relations, and that their marriage should be under the English *régime*, yet the provision of English law which revokes a will by subsequent marriage was not a reasonable one, and must be considered

as part of the testamentary rather than of the matrimonial law, and was accordingly not intended to affect their testamentary powers, and the will was therefore valid. The validity of the wife's exercise of testamentary power, according to the ordinary rule, was thus determined by the provisions of the law of her domicile (French).

### Samoa.

The Convention between Germany and Great Britain of November 14 last marks the close of the unsatisfactory *tri-dominium* set up in Samoa by the Final Act of the Convention between these two Powers and the United States respecting Samoa made in 1889. The latter provided for the independence and neutrality of the islands of Samoa, and equality of rights between the subjects of the treaty powers there, and modified the earlier treaties made between Samoa and the treaty Powers separately: it set up a Supreme Court of Justice, consisting of a Chief Justice chosen by the three Powers, who had power to decide all questions arising under the Act, and the validity of the powers of the king and chiefs and the succession to the kingship, and differences arising between Samoa and the Powers, and was only removable by a majority of the treaty Powers. He could administer English common law, equity and admiralty law, and in the case of crimes apply the provisions of American, English, or German law, and in the case of Samoans and South Sea Islanders the punishment provided by the laws and customs of Samoa; but the consular jurisdiction was retained as well. On the death of the king, however, disorder broke out, and the decision of the Chief Justice as to the succession was not obeyed: and the Commissioners sent by the treaty Powers last year to restore order reported in favour of abolishing the kingship and consular jurisdiction, and of setting up a legislative council.

and other amendments of the Final Act, also recommending that the islands should be put under one Power. The present arrangement adopts this suggestion by dividing the islands between the three treaty Powers, and abolishing extritorial jurisdiction of the two parties to it therein; while Germany also gives up her right of extritoriality in Zanzibar, and she and Great Britain divide the neutral zone between their possessions in West Africa established by a Convention of 1888. It also extends to Samoa the stipulation of the Berlin Declaration of 1886 respecting mutual freedom of commerce between the two nations in the Western Pacific.

G. G. PHILLIMORE.

#### VIII.—NOTES ON RECENT CASES (ENGLISH).

BY sect. 25, subs. 2, of the Local Government Act, 1894, it is provided that where a highway repairable *ratione tenuræ* appears, on the report of a competent surveyor, not to be in proper repair, and the person liable to repair the same fails, when requested by the District Council, to place it in proper repair, the District Council may place it in proper repair, and recover from the person liable to repair the highway the necessary expenses of so doing. The Daventry District Council, in *Daventry District Council v. Parker* (108 L.T. 11), brought an action to recover the expenses incurred by them in repairing a certain highway in the district after they had requested the defendant to repair it, and he had failed to do so. The highway was on land which was owned by the defendant, but was in the occupation of his tenant. The defendant raised the point whether an owner of land who was not the occupier was "the person liable to repair" under the above section. The Queen's Bench Division (Wills and Bruce, JJ.) held that the defendant was entitled to



judgment. The plaintiffs appealed to the Court of Appeal, on the ground that even if the owner was not indictable, and the occupier was, nevertheless the occupier had a right of indemnity against the owner, and the owner therefore was in fact "the person liable to repair." The appeal was dismissed. It is evident that the above section does not alter the liability of persons liable to repair *ratione tenuræ*, but only the procedure for enforcing that liability.

The above case is on all fours with the earlier case of *Cuckfield Rural District Council v. Goring* (L.R. [1898] 1 Q.B. 865); moreover, in *Baker v. Greenhill* (3 Ad. & Ell. (Q.B.) 148), a case decided in 1842 by Lord Chief Justice Denman, it was distinctly held that where lands charged with repair of a bridge are occupied by a person not the owner, such occupier is primarily responsible to the public for the repairs, although he may demand reimbursement from the owner. The judgment in *Darlington District Council v. Parker* is therefore in every way entitled to respect.

*In re London and Northern Bank, Ex parte Jones* (W.N. 230), is an interesting case with regard to the law of offer and acceptance. One Jones, living at Sheffield, applied for shares in the above bank. On October 26 he wrote a letter to the bank, withdrawing his application; the letter was received by the bank at 8.30 a.m. on October 27. On the afternoon of October 26 the directors resolved to allot the shares to Jones. The notice of allotment was prepared, during the night of October 26, and about 7 a.m. on October 27 was taken to the outside of the General Post Office in St. Martin's-le-Grand. Here a postman came by and offered to take the letter. He was given a fee for his trouble, and entered the General Post Office, coming back afterwards to say that it was all right. The allotment letter

to Jones was not delivered in Sheffield until 7.30 p.m. on October 27. The postmarks show that the letter had in fact been posted at a district office, and did not leave for Sheffield until noon, instead of two hours earlier, as it would had it been posted at the General Post Office. It was further shown that town postmen were not allowed to take charge of letters for the post. Cozens Hardy, J., decided that an offer is to be deemed accepted when a letter of acceptance is posted, the Post Office being a common agent for both parties. This was so held in *Harris's case* [1872] (L.R. 7 Ch. 587). Therefore no delay on the part of the Post Office in delivering the letter would be material; but it is evident that the withdrawal, in order to be effectual, must be made before the offer is clinched, by the posting of the allotment. The postman who took charge of the letter could not be an agent of the Post Office to receive the letter, because town postmen are forbidden to receive letters. What he did with it, is not clear, save that he somehow caused it to be received by a district post-office. One thing is certain, he pocketed his fee. Cozens Hardy, J., properly decided that the withdrawal was received by the bank before the letter of allotment was posted, and therefore Jones must be relieved of his contract.

This case adds one more link to the great catena of authority on the interesting subject of offer and acceptance by letter. In *Dunlop v. Higgins* (1 H.L. 381), a case in which a letter of acceptance was delayed in the post, and the offeror repudiated the contract when the acceptance arrived, Lord Cottenham, delivering the judgment of the House of Lords, laid it down as a general rule that if the party accepting the offer put his letter into the post on the correct day, he has done everything that he was bound to do. This language covers the case of a letter lost in the post; but the Court of Exchequer, in *Coleman's case* (L.R.

6 Ex. 108), held that it does not apply to a lost letter. The most interesting point of all is the suggestion what would be the judgment of the Court if, when acceptance is made by letter, the letter is posted, but the acceptor revokes the acceptance by telegraph, which of course arrives long before the letter. We submit that the telegram would be inoperative, and it is not easy to see how our Courts could decide otherwise, in face of earlier decisions. He has sent an unconditional acceptance, and there is no reason why he should have an opportunity of changing his mind, which he would not have enjoyed if the contract had been made *inter presentes*.

The London County Council made a bye-law, under s. 16 of the Local Government Act, 1888, for the good rule and government of the county, that "no person shall frequent and use any street or other public place, on behalf either of himself or any other person, for the purpose of bookmaking, or betting, or wagering, or agreeing to bet or wager with any person, or paying, or receiving, or settling bets." It was contended in *Thomas v. Sutters* (108 L.T. 33) that the above bye-law was invalid, as being inconsistent with the provisions of the Metropolitan Streets Act, 1857, s. 23, which contains words similar in effect. The Court of Appeal (Lindley, M.R., Sir F. Jeune, and Romer, L.J.) held that there was no inconsistency between the bye-law and the statute, and that the bye-law was valid. This decision upholds the decision of Kekewich, J., in the Court below, and affirms *White v. Morley* (80 L.T.R. 761), decided by Darling and Channell, JJ., in the Divisional Court.

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*Lane* (app.) v. *Rendall* (resp.) (108 L.T. 12) is a good illustration of the uncertainty of the law. The respondent was charged, under s. 25 of the Weights and Measures Act, 1878

(41 & 42 Vict. c. 49), for having in his possession for use in trade a weighing-machine which was false or unjust. There was merely a piece of paper underneath the scoop, in which the tea, or other article, to be weighed was placed; that is to say, between the bottom of the scoop and the cup in which the scoop rested. The effect of such paper upon the weighing-machine made it indicate one and a half drams—the weight of the paper—in excess of the actual weight of the article in the scoop. In the absence of the paper the machine showed the actual weight of the article in the scoop. The paper was placed below the scoop merely for convenience—the article was tea—and the paper weighed less than the bag in which the tea was to be wrapped. Yet the Divisional Court (Ridley and Darling, JJ.) held that the appellant was liable to be convicted of having an unjust weighing-machine in his possession, although the recognized custom of the trade to weigh tea in this manner for convenience was clearly proved. Lane might have escaped had he been proceeded against under the next section, viz. s. 25. In 1893 a grocer was charged under that section with committing a fraud in using his scales. The inspector bought tea and other articles from the appellant, and in each case a paper bag was weighed along with the article, causing a really considerable deficiency. The practice was well recognized, and the purchaser did not protest. The Divisional Court (Mathew and Bruce, JJ.) questioned the conviction made by the justices, holding that the practice was so well known and so universally followed that there could be no pretence for holding that any fraud was practised (*Harris* (app) v. *Allwood* (resp.) (57 J.P. 7)). It will be observed that the one section forbids the having of unjust weights, and the other section forbids the fraudulent user of the same.

The Divisional Court (Ridley and Darling, JJ.) have given a decision in *Wride* (app) v. *Dyer* (resp.) (108

L.T. 58) which, we venture to think, might be upset if appealed against. The appellant was tenant to the respondent upon a yearly tenancy, from Lady Day to Lady Day. The contract was verbal. On March 24, 1898, notice to quit, duly signed by the respondent, was served on the appellant in these words: "I hereby give you notice to quit and deliver up to me all that cottage which you hold of me, known as —, on the 24th day of June, 1898, or at the end of your current year's tenancy. Dated this 24th day of March, 1898." The appellant did not quit. He contended that the notice was not legal, inasmuch as the tenancy being a yearly tenancy from the 25th day of March of each year, it could only be determined by at least half a year's notice to quit at the end of a year of the tenancy; and that the notice was either a three-months' notice to quit on June 24, 1898, which was not the end of a year of the tenancy, or a one-day's notice to quit on March 25, 1898. It was contended, on the other hand, by the respondent that it was a legal notice to quit on March 25, 1899. The question for the Court was whether the latter contention was good. The Court decided that the respondent's contention was correct, and that the notice was a good notice to quit on March 25, 1899. In this decision we regret to say that the Court followed *Doe v. Culliford* (4 D. & R. 248), which held that a notice dated 27th and served on the 28th September, requiring a tenant to quit "at Lady Day next, or at the end of his current year," must be understood to mean a six-months' and not a two-days' notice. *Doe v. Culliford* was disparaged by Lord Chief Justice Denman in *Doe v. Morphet* (7 Ad. & Ell. (Q.B.) 577), who said, "I am of opinion that *Doe v. Culliford* is not good law." Mr. Justice Patteson did the same. He said, "I confess I do not agree with the doctrine there (*Doe v. Culliford*) laid down. If we are to interpret notices upon the principle there acted upon, where can we stop? I think the case

is not good law." Indeed, we may well echo the words of the learned judge: If *Wride v. Dyer* be good law, where can we stop? Darling, J., founded his judgment on *Doe d. Williams v. Smith* (5 Ad. & Ell. 350), but even there Littledale, J., terms the notice "lame and inaccurate."

Every subject of her Majesty is held in theory to be acquainted with the law, yet, as a matter of fact, in *Bavins v. London and South-Western Bank* (108 L.T. 129) neither the parties, their solicitors, their counsel, nor the learned judge himself, knew of s. 17 of the Revenue Act, 1883! Had any one, even an *amicus curie*, quoted it to the Court, the whole *raison d'être* of the case would have disappeared, save on a collateral point. It remained for the Court of Appeal to set the matter right.

Perhaps one of the most important judgments on the status of married women was given by Byrne, J., in *Earle v. Kingscote* (108 L.T. 129). A married woman had entered into a contract with the plaintiff, and subsequently, by means of false representations, obtained £2000 from him. Plaintiff brought an action against her and her husband to recover the £2000. The husband alleged that the transaction was without his knowledge, and that he had not participated in the use of the money. Byrne, J., however, held that the cases in which a husband is to be held exempt from his common law liability for his wife's torts must be limited to cases in which the fraud was not only directly connected with the contract, and parcel of the same, but was also the means of effecting (in the sense of obtaining) the contract. In the above case the contract was effected prior to and independently of the fraud, therefore he held the husband liable in damages for the tort complained of. If this decision be not reversed—and we see no reason why it should—it is bound to visit a husband with injustice by making him liable for all his wife's torts

which he cannot control, and of which he may even be ignorant. Under the old law, where a husband was entitled to all his wife's goods and chattels, the position of the husband was perhaps endurable—now it is not. It should be added that the above decision is concomitant with *Seroka v. Kattenburg* (54 L.T. 649), and with the remarks of Lord Esher, M.R., in *Scott v. Morley* (87 L.T.R. 919).

SHERSTON BAKER.

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*A History of the Law of Nations.* By THOMAS ALFRED WALKER, M.A., LL.D. Cambridge: The University Press. 1899. Vol. I.

The work, of which this is the first volume, promises to be a valuable assistance to the study of International Law, and to supply a gap in the literature of the subject. The volume now issued embraces the period up to the Peace of Westphalia. In his introduction, Dr. Walker first of all discusses the propriety of the name "International Law," and argues with considerable force against Austin's objections to the term. He then proceeds to consider the "Evolution of International Law," and traces the rules of conduct towards other nations in peace and war of the Israelites, Greeks, and Romans, and on through the Middle Ages down to the end of the 'Thirty Years' War. This history is very interesting, and it is curious to notice the ebbs and flows in the tide of international advance, and how the Romans, the knights of the Middle Ages, and the Moslems, all in turn fell from an earlier and higher standard, and, most interesting to observe, the influence exercised by Christianity, the Crusades, and the Church. It is also remarkable how long it was before the idea of Neutrality seems to have been realized. It reminds us of the recent Peace Congress and the Dum Dum bullet, when we read that the Second Lateran Council (1139) forbade the use of the cross-bow, a prohibition which does not seem to have

\* Several reviews of new editions are unavoidably held over owing to want of space.

been long effective. Dr. Walker also deals in this volume with the literature of International Law, tracing its growth through Civilians, the Canonists, the Moral Theologians, to Gentilis and the great Grotius himself. He gives useful summaries and analyses of the most important writers in these classes, specially interesting being the work of the Spanish theologian Franciscus a Victoria, who deals with his subject with a surprising "brilliancy and independence of thought," and lays down principles much in advance of the practice of the age. An elaborate and appreciative analysis of Grotius's great work concludes the volume, and we shall look forward with interest to the continuation of a work so well begun.

*The Roman and Roman-Dutch Law of Injuries.* By MELIUS DE VILLIERS, M.A., LL.B. London: William Clowes & Sons, Limited. 1899.

The only parts of the British Dominions in which the Roman-Dutch law prevails are Ceylon, British Guiana, the Cape Colony and Natal. It is possible in the not-distant future this sphere may be enlarged; in which case no doubt the law will meet with increased attention. The present work is, as indicated by its sub-title, a translation of the title "*De Injuries*" from the great Dutch Jurist Voet's Commentary on the Pandects with annotations. Mr. de Villiers is well equipped for the task he has undertaken, and gives a list of authorities creditable alike to his erudition and his candour, as he has taken the somewhat unusual course of marking with an asterisk those he has consulted. There is a short but interesting introduction; but we could have wished that the author had pointed out in more detail, on what points the Dutch customs or local laws modified the Roman law, and had also given us some idea as to what extent the law has become modified, if at all, since its introduction into South Africa, either by the course of judicial decisions or ordinances. The book will be examined with much interest by lawyers, and many points in our law will have light thrown on them by a careful comparison with the Roman law. Mr. de Villiers' annotations are very full, and supported by numerous authorities of weight, and where he does not agree with Voet he has the courage to say so. Some interesting questions are fully discussed, such as the position of corporations in respect of actions of injury, and the liability for repetition of defamatory statements originated by others, and there is much else that is worth the attention of jurists.



*The London Government Act, 1899.* By ALEX MACMORRAN, M.A., Q.C., S. G. LUSHINGTON, M.A., B.C.L., and E. J. NALDRETT. London: Butterworth & Co. 1899.

The London Government Act, 1899, is in some way a remarkable Act. It proposes to carry out the very important objects for which it was passed mainly by reference to the Statutes of the past, and the action of the Privy Council and the Local Government Board in the future. Seldom can there have been an Act in which legislation by reference was carried so far, or in which so much was left to be done by schemes and orders. Such an Act, more than others, requires a book to explain it, and the present one does much towards that end. Besides the Act itself, it purports to contain such parts of other Statutes as are specially incorporated or referred to therein, but does not attempt to include the adoptive Acts. There are a number of notes to both the principal Act and the other Statutes. These contain a great deal of necessary information, and are very clear and accurate, but we are inclined to think are mostly too short. We would gladly have seen a longer note on section 30, which deals with existing officers, and also think the subject of Charities might have been more fully dealt with, and though section 70 of the Local Government Act, 1894, is stated in the note to be *post*, we have been unable to find it. An introduction pointing out the chief features and objects of the Act would have been a great assistance in considering it. No doubt Mr. Macmorran and his colleagues deliberately decided upon the present compass of their work, in order to make it all they claim for it, namely, "a convenient edition" of the Act. The book is excellently got up, the paper, type, margin, etc., being all that can be desired.

*Commentaries on the Procedure of Civil Courts in British India.* By HUKM CHAND, M.A. Bombay: The Bombay Education Society's Steam Press. 1899. Vol. I.

Mr. Hukm Chand is well known as a legal author, his important works on *Res Judicata* and *Law of Consent* having met with a very favourable reception. However, works of learning and research as they were, they seem likely to be quite surpassed by the present, of which the first volume contains something like a thousand closely printed pages. The work aims at being "an exhaustive treatise on the procedure of Civil Courts, with a special reference to the Indian Code of Civil Procedure, which may be useful not only in British

India and Indian Native States, but wherever questions of procedure arise and are settled on general principles of Jurisprudence." To carry out such a programme, it is necessary to be familiar with the laws and codes of many countries, and to have not only this knowledge, but also great powers of marshalling and arranging the same. As far as we have been able to judge, Mr. Hukm Chand possesses both these requisites in an eminent degree. He annotates and illustrates the Code of Civil Procedure, with references to cases and principles of English and American as well as Indian law, and this without overweighting the notes or rendering them obscure; and although the book is intended mainly for the use of practitioners in the Indian Courts, we can recommend a reference to it by English lawyers when they want to support propositions by further authorities than we find in our English Reports, or to examine the broad principles which are so often common to codes of law differing widely in many of their details.

*The Yearly County Court Practice, 1900.* By G. PITT-LEWIS, Q.C., C. ARNOLD WHITE, B.A., and ARCHIBALD READ, B.A. London: Butterworth & Co. 1900. 2 vols.

A great deal of labour has been expended on the present edition of this work. It need scarcely be said that it has, as usual, been brought up to date in its notices of cases and statutes; but a good deal more than this has been done. Many of the notes have been practically rewritten, and many interesting and difficult points have been carefully considered and commented on. But even the learned editors are not prepared to give a decided opinion on some of the questions, as, for instance, whether the High Court has power to order the taxation of County Court costs. There is a particularly useful summary of the Practice on Appeals, and valuable practical information is given as to how a party is to insure a point of law being open to him on appeal. But the most novel feature of the book is the addition of some practical nautical information, for the benefit of both judges and advocates dealing with collisions and such like matters. Mr. Pitt-Lewis has no doubt found, from his experience at the City of London Court, how useful such knowledge is, and with the assistance of his nautical friends has provided it for the benefit of his readers. We might also call attention to the notes on the cases decided under the Workmen's Compensation Act. Thorough information on this subject is indispensable to any lawyer

who practises in the County Court, and he will thoroughly appreciate the pains and ability which have been employed in this instance to meet his requirements.

*Workmen's Compensation Cases.* Edited by R. MINTON-SENHOUSE. London : William Clowes & Sons. 1899.

*The Case Law of the Workmen's Compensation Act, 1897.* By R. MINTON-SENHOUSE. London : Effingham Wilson. 1899.

Mr. Minton-Senhouse is indefatigable in his labours to elucidate the difficulties of the Workmen's Compensation Act, 1897. Both his last productions may be considered as supplemental to his larger work, and both should prove very useful to those who have to deal with the Act. In the first are published from various sources nearly if not quite all the cases of any importance decided by the Court of Appeal, and some important decisions of County Court judges, together with a few notes by the editor. The convenience of having all the cases on the subject in one handy volume can be well understood. The other book contains in a short form the effect of the cases decided since the Act, as well as a good many decided before, which may help to explain definitions, etc. Its value and interest is considerably increased by letters from Mr. George Livesey, Mr. Thomas Burt, M.P., and the manager of the Law Accident Insurance Society, commenting on the Act from the point of view respectively of the employer, employed, and insurer. In the appendix is given the Report of the Registrar of Friendly Societies, containing a very interesting account of the proceedings of the registrars under the Act in reference to schemes, and the Workmen's Compensation Rules, 1899.

*The Annual Statutes, 1899.* By J. M. LEIV, M.A. London : Stevens & Sons. 1899.

*Paterson's Practical Statutes of 1899.* Edited by JAMES SUTHERLAND COTTON. London : Horace Cox. 1899.

The past year not having been very fruitful in legislation, the editors of these two valuable series of selected and annotated statutes have not had their industry tried so severely as usual ; but their labours in the way of summaries, introductions, and notes are carefully and judiciously done, and go far to lighten the labours of those who have to consult the Statutes they have dealt

with. The books are different both in size and arrangement, as Mr. Lely gives his Statutes in alphabetical order, and precedes the collection with a summary giving the effect of each; while Mr. Cotton takes the Statutes in chronological order, and puts an introduction, when he considers it necessary, before the Statute. We have found the summary, introductions, and notes to be both accurate and useful.

*The Yearly Supreme Court Practice, 1900.* By M. MUIR MACKENZIE, B.A., S. B. LUSHINGTON, M.A., B.C.L., and JOHN CHARLES FOX. Assisted by C. G. S. McALESTER, B.A., ARCHIBALD READ, B.A., and BRUCE L. RICHMOND, M.A. London: Butterworth & Co. 1900.

We are glad to see that experience has justified the issue of this work for another year. The arrangement is decidedly good, and it is a remarkably handy book for the immense amount of matter it contains. The selection of cases to be cited, in notes so concise as those to the present work, involves the greatest care and discrimination, and the names of the editors are a guarantee that this has been employed. There are not many new features to notice, but the notes on Attachment and Committal have been rewritten, and are now a very valuable contribution on the subject. The Judicial Trustees Act, 1896, and the Settled Estates Act Orders, 1878, have been added. It is curious to note how very few cases can be cited on so important a branch of practice as the Summons for Directions.

*The Law of Account.* By SYDNEY F. WILLIAMS. London: Stevens & Sons, Limited. 1899.

Mr. Williams has supplied a very useful volume on the subject of account. Few subjects are of more practical importance, not only to practising lawyers, but to business men and to most of the public. Many of the most important branches of the subject are dealt with in special works, such as those on Trusts and Executors; but to collect all the cases and rules together in one work, and to deal with them clearly and practically, is to supply an undoubted want. This Mr. Williams has done, and has done well, and the headings of a few of the chapters—namely, Receivers and Liquidators, Guardian and Infant, Committee of Estate of Lunatic, Patents, Trade Marks, etc.—will show that he deals with a wide range of subjects, besides the more ordinary cases of Mortgagees, Trustees, Executors, etc.

## CONTEMPORARY FOREIGN LITERATURE.

*L'Abordage ; Étude d'Histoire du Droit et de Droit Comparé.* By HENRI ROLIN, Docteur en Droit. Pp. 246. Brussels, 1899.

This thesis for the degree of *docteur spécial* in the *Université Libre* of Brussels shows considerably more learning and research than most productions of a similar kind. It provides a most instructive study of the gradual development of the rules for assessment of damage by collision from the *Lex Aquilia* to the present day. The English Admiralty rule, dating from 1789 and sanctioned by the Judicature Act, 1873, differs from that of Continental nations, but has been adopted with modifications by the United States and most of the colonies. It was condemned by the Conference on Maritime Law, held in London in July, 1899, the rule there recommended being that the damage should be apportioned according to the amount of negligence of those in command of each vessel.\* Dr. Rolin (p. 194) recognizes in the history of the subject four great periods: (1) that of primitive practice, where the tort-feasor is responsible by virtue of a presumption of *dolus*; (2) that of the *Règles d'Oléron*, where he is entitled to take an oath that he is not guilty of *dolus*, and if he take such oath, the damage is equally divided; (3) that obtaining during the five centuries from about 1300 to 1800, where the division is made only where the collision is accidental; (4) that of the Roman law principle revived, where no action can arise from accident, and division is made only where, as in France, negligence is doubtful, or where, as in England, both ships are to blame. The work concludes with a hope, or even an expectation, that means may be found for the Nations meeting on common ground and adopting universal principles, as in the case of the Sailing Rules. There seems to be a growing tendency towards such unity in the case of one or two of the more important principles of maritime law. The labours of the author's countrymen, *L'Association Belge pour l'Unification du Droit Maritime*, may some day be crowned with success.

\* A translation of the dissenting opinion of Mr. Douglas Owen was contributed to the *Rivista di Diritto Internazionale*, 1899, Nos. 7 and 8, by Signor Senigallia of Naples, who has been good enough to send a reprint of it to the L. M. and R.

*Die Strafgeseztgebung der Gegenwart in Rechtsvergleichender Darstellung.* Vol. ii. *Das Strafrecht der Ausser-europaischen Staaten.* Edited by Dr. FRANZ VON LISZT, Halle, and Dr. GEORG CRUSEN, Berlin. Pp. 540. Berlin, 1899.

This large quarto volume contains an exhaustive account of criminal law and procedure in non-European States. Vol. i. (published in 1894) had dealt only with European States. As an appendix to the present volume is a sketch of any important matters which have arisen in European States between 1894 and 1898. So that the two volumes together give the student of comparative jurisprudence as full a treatment as he is likely to find of the legal systems of the world from the standpoint of criminal law. The work deals not only with independent States, but with colonies and dependencies, even as remote as Ascension and the Falkland Islands. Since a reviewer is not omniscient, it is impossible to judge of the correctness of the whole. But in those cases in which an English lawyer may be supposed to have some smattering of knowledge, e.g. India, Canada, and Australia, the work seems very complete and the best authorities cited. It is noticeable in how many places a judicial declaration of intamy (*Ehrloserklärung*) is still part of the punishment, e.g. in the Orange River Free State. Peculiar to America are the ante-option laws (something like Sir John Barnard's Act of last century legislation in England), the provisions against pools and trusts in Illinois, the convict-lease system of Alabama.

*Anarchismus und Strafrecht.* By Dr. HERMANN SEUFFERT, Professor des Strafrechts in Bonn. Pp. 219. Berlin, 1899.

The learned author cites works on Anarchism and Nihilism which are sufficiently startling. From Netschajew's *Katechismus der Revolution* (p. 22), we gather that the revolutionary is the implacable foe of the world, and if he continue to live in it, it is but to destroy it the more surely. He knows but one science, destruction. Among the duties of a revolutionary is that of habituating himself to endure torture (p. 23). The *Freiheit* of April 21, 1894, states that bomb-throwing is not *Anarchie* or *Anarchismus*, it is tactics pure and simple. In the face of these and even stronger sentiments it is not to be wondered that Dr. Seuffert suggests that the law as it stands is, in most civilized countries, not sufficiently stringent for the protection of society. He accordingly drafts one for which he would ask general reception. The usual charges of harbouring anarchists are made against England.

## PERIODICALS.

*Journal du Droit Internationale Privé.* (1899. Nos. VII.-X.) Paris.

The principal case of interest is that of *Marquis de Santa Cristina v. Prince and Princess Del Drago* (p. 744). It lays down the rule, no doubt equally good in England, that a husband and wife before their marriage may contract that the marriage settlement is to be governed by the law of a particular State, and such contract will be enforced, if not contrary to public policy, on the principle of *locus regit actum*. The case also discusses the maxim of old French law, *Nul ne plaide par procureur*, aimed at the attempted withdrawal of X from liability to exceptions by putting forward Y as the nominal plaintiff. This will remind the English lawyer of some of the cases in the law of agency. In *Lord Abdy v. Lady Abdy* (p. 804), the decision that a gift between husband and wife in France must be made in accordance with French law is not avoided by the fact that there is no such person as Lord Abdy known to the peerage.

*Rivista Politica e Letteraria.* (October-December, 1899.) Rome.

The article on the relations of this country with the South African Republic is a sample of the opinion generally held by Continental jurists, one, it is hardly necessary to say, not favourable to us. The "Lord Abdy" of the French writer is paralleled by the "Lord Balfour" and "Sir Cecil Rhodes" of the Italian. This is the age of books on Comparative Jurisprudence, and the *Rivista* in the November number contains a notice of what appears to be an interesting one by Antonio Monzilli on joint-stock companies in various countries. They have apparently been overdone in Italy, and the reviewer remarks bitterly, *No basta Giuda a sostenere il peso*.

*La Giustizia Penale.* (September-December, 1899.) Rome.

This well-known periodical continues to be interesting. Immense quantities of criminal law are supplied for the modest subscription of ten lire a year. Some of the cases reported are not devoid of the humorous element. Thus, at p. 1290, there is a decision that to generally "make hay" of a *chapelle ardente* and at the same time utter violent and outrageous slanders against the deceased and spit in his face constitutes the crime of outrage to a corpse and not of slander to his memory. At p. 1476 it was held that to deposit a legitimate child at a foundling hospital for illegitimate children

rendered the depositor guilty of *truffa*, the nearest approach to which in England would be obtaining money by false pretences.

*Deutsche Juristen-Zeitung.* (October-December, 1899) Berlin.

These numbers are almost entirely occupied with discussions on different questions, hypothetical and practical, arising out of the new Civil Code which came into operation last New Year's Day, and with a case as to club law (*Klub der Harmsen*), which seems to have excited much interest in Germany.

*Kosmodike.* (September-November, 1899)

There is no article in the English language in any of these numbers of this cosmopolitan review. It contains very interesting sketches of the profession of advocate in Austria, Russia, Belgium, Spain, and Monaco. In Russia an advocate appears to be paid by results, *i.e.* a percentage on the amount claimed. In reference to the war in South Africa there is a useful abridgment of the laws of most European countries as to the length of time necessary for naturalization and as to the jurisdiction of their tribunals over aliens.

Also received *Revue Générale*, *Revue Bibliographique Belge*, *Statsvetenskaplig Tidskrift*, but they contain no contributions of legal interest.

JAMES WILLIAMS.

## SOME WORKS OF REFERENCE.

*The Royal Blue Book: Court and Parliamentary Guide*, 1900. London: Kelly's Directories, Ltd. This invaluable directory now makes its appearance for the seventy-eighth year in succession, and this circumstance is one which appears to render superfluous any detailed reference to the work. Glancing through the pages of the current issue, we do not note any important changes in the method of compilation, and indeed we fail to see where there would have been room for any fresh improvements. Clearness and conciseness have ever been the watchwords of those responsible for the *Royal Blue Book*. The work is not simply a street directory, as it contains much valuable information respecting the Royal Household, the Judiciary, the Services, etc.

*Whitaker's Almanack*, 1900 (32nd year.) Whitaker & Sons. Pp. 776. It is again our pleasant task to call attention to this indispensable publication. Amongst the new features we notice that "Our Ocean Mail" has this year been entirely rewritten, and is now incorporated in an article entitled "Ocean Mercantile Fleets, British and Foreign," which will be found to contain several interesting statistical tables. An historical record of South Africa, showing the origin of the Boer grievances in the early part of the century, has also been added, whilst in the supplementary portion will be found, in addition to the usual contents, an article



on the growth of Joint Stock Companies in the present century, while the new London Government Act has also been treated.

*Hazell's Annual for 1900.* Edited by W. PATMER, B.A. (15th year). London: Hazell, Watson, & Viney, Ltd. 1900.—This valuable annual contains as usual an astonishing amount of information, and its accuracy is very surprising when the mass of matter with which it deals is considered. The present issue pays special attention to Foreign Affairs and, with its maps and summaries of negotiations and treaties, gives an ordinary reader full information of the most important of our foreign relations. The summary of the negotiations with the Transvaal is particularly full and opportune. It quite keeps up its previously high standard in all respects.

*Whitaker's Peerage, 1900.* Pp. 542. Whitaker & Sons.—This work, which is *Whitaker's Titled Persons* under a new title, is a very complete and accurate directory of the class of "titled persons." The work, as now presented, has been thoroughly revised, and the Politics of all members of the House of Lords are stated in the Directory. Every effort seems to have been made to verify the accuracy of all references, and the work is in every way a worthy companion to the *Aldinack*.

*Herbert Fry's Royal Guide to the London Charities.* Edited by JOHN LANF. (36th annual edition.) London: Clutton & Windus.—This is a most useful and comprehensive annual, which should be within reach of all philanthropists and good Samaritans. The charities are arranged in alphabetical order, showing name, date of foundation, address, objects, annual income, chief officials, etc., and in addition the Editor's preface is both instructive and interesting.

*The Lawyer's Companion and Diary, 1900.* Edited by E. LAYMAN, B.A. London: Stevens & Sons. This publication, so well known to the legal profession, contains, in addition to a diary for every day of the year, various tables of costs, stamp duties, time-tables of the Courts, and much other information which the practising lawyer needs always at hand for ready reference. It is a complete London and Provincial Law Directory.

Received too late for notice in this issue:—BROWN'S *Bainbridge's Law of Mines and Minerals*; LIGHTWOOD'S *Parcell's Landlord and Tenant*; LECKY'S *Map of Life*; HARVEY'S *West Australian Law Reporter*; DIXON'S *Law and Practice of Divorce*; FASION'S *Appointment of New Trustees*; GRAHAM'S *English Political Philosophy*; WAKBURN'S *Justice's Note-Book*; INNES' *Law of Easements*; CAMPBELL'S *Ruling Cases*; HAYWOOD'S *Imms Practice*.

Other publications received.—*Alphonse Ruer's Journal of Comparative Legislation* (John Murray); *The Briel, Irish Weekly Law Reports and Journal*.

The *Law Magazine and Review* receives or exchanges with the following, amongst other publications:—*Review of Reviews, Juridical Review, Public Opinion, Law Times, Law Journal, Justice of the Peace, Law Quarterly Review, Irish Law Times, Scots Law Times, Australian Law Times, Speaker, Accountants' Journal, North American Review, Canada Law Journal, Chicago Legal News, American Law Review, Harvard Law Review, Case and Comment, Green Bag, Virginia Law Register, American Lawyer, Albany Law Journal, Madras Law Journal, Calcutta Weekly Notes, Law Notes, Queensland Law Journal, Law Students' Journal, Westminster Review, Concord, Bombay Law Reporter, Medico-Legal Journal, Kuthiawar (Indian) Law Reports.*

# THE LAW MAGAZINE AND REVIEW.

No. CCCXVI.—MAY, 1900.

## I.—IN MEMORIAM: THE RIGHT HONOURABLE LORD JUSTICE CHITTY.

A SUFFICIENT time has elapsed since the death of Lord Justice Chitty to enable one who knew him well to express an opinion as to his work as a judge, without danger of allowing a feeling of personal affection and admiration to warp judgment.

The Public can tell whether a judge is expeditious or slow, whether he is courteous and patient or hasty and rude, whether he plays to the gallery or not, but it cannot know whether he is learned and well-read.

Suitors are capable of appreciating the care, attention, and patience given by a judge to their individual cases, but they are not capable of appreciating the amount of learning and the accumulated result of legal experience brought to bear in the everyday matters which come before a Judge of the Chancery Division.

Solicitors are fair and capable critics of a judge in his relation towards themselves and their clients, and, apart from an appreciation of the highest exercise of judicial faculties, they are as qualified as any to give a true verdict upon his work.

Members of the Bar can speak of a judge, and form and

express their judgment from the point of view of advocates and read lawyers.

Those who daily practised before the late judge, can speak, besides, of patience, forbearance, allowance for demands of clients to have their cases stated, and of the importance of the Court as a school of law. From the last-named a deep debt of gratitude is due to the late judge. To them day by day the store of knowledge, wisdom, and experience of an acute, a learned; worldly-wise, and accomplished lawyer and scholar, was given without reservation. Tolerant of reference to apposite quotation from modern writers, loving and ready to cap classic allusion, he was absolutely opposed to flourish. "That is rhetoric, is it not, Mr. X.?" he would say good-naturedly, when an advocate was tempted to stray beyond the strict line of logical reference, and Mr. X. would retire from the position; "per Mr. Z.," then he would say, summing up an argument addressed by counsel, giving the result in a fair but most destructive deduction.

There will be no dissentient voice, I am sure, from the ranks of the public, suitors, solicitors, or the Bar, if the opinion of the writer be expressed that no man ever went from the court of justice with a sense of wrong done him when Chitty presided. No suitor ever left his court without feeling that his case had been fully and fairly tried, no solicitor ever felt that his client had suffered injury on account of the impatience of the tribunal, or the inexperience of the advocate.

But the Bar will bear another testimony to the great qualities of the late judge. They will say that he was a great lawyer, and great not only in his knowledge of equitable principles, but in his intimate acquaintance with the law relating to real property, and with the common law even in some of its obscurer and now nearly forgotten branches.

A friend of the writer, well qualified to speak on the matter, says of him: "He *knew* law; many of us have, as it

were, a banker's balance of knowledge in our libraries, if we are given time to go and draw upon it; but Chitty's knowledge was ready money. It is hardly a figure of speech to say that he had his law at his fingers' ends, so ready, so accurate, so unfailing was his answer to any call upon his knowledge. He did not merely know where to find the law on such or such a point—he could and did tell you at once what that law was."

Coupled with an intense hatred of anything that savoured of fraud, oppression, or dishonourable conduct, Chitty never moulded the law into strange shapes to meet his private sense of what was honourable or right from a moral point of view.

Within the law the rogue never failed to meet his deserts but he had what the law allowed him. An occasional expression of indignation against mean and dishonourable conduct, an occasional expression of impatience with a counsel who the judge thought was pressing an untenable point too far, did not prevent the exhibition as a judge of one of the sweetest and fairest judicial tempers man was ever blessed with.

One point, not perhaps sufficiently appreciated by those who did not practise before him up to the end of his career is that as a judge he ripened and improved year by year, and to the last day he sat, showed how a great mind is capable of improvement.

Was he then without faults? Who is? In the early part of his career as a judge it may be said he sometimes appeared to lack sufficient confidence in his own knowledge.

Quick to perceive, he was somewhat slow to determine though this diffidence disappeared with experience, he was to the last reluctant to decide without having each point raised thrashed out. It may be that his love of the law led him occasionally to invite a discussion of points not so closely related to the case before him, and although it coul

never be said of him, in the words of Lord Bacon, that "a loquacious judge is no well-tuned cymbal," the Lord Justice, like his predecessor, Sir George Jessell, spoke frequently in the course of the argument.

If it be the primary duty of a judge to do justice according to law, as between suitors in the immediate case before him ; if it be a duty hardly second to it to satisfy parties that they have been fairly heard, these duties were never better fulfilled. If it be a grace to a judge to be patient and courteous, that grace was his ; if it be an ornament that he should express the law in clear and lucid terms, that ornament was his.

The fame of a judge rests with posterity, a true estimation of his work with his contemporaries. Chitty forwarded the work commenced by Sir George Jessell, in moulding the new practice and procedure inaugurated by the Judicature Acts, and in making that a success which in weaker hands might well have failed ; and, undoubtedly, his decisions under the Settled Land Acts—the greatest real property revolution effected in this country for centuries—have much to do with its success.

Nothing has been said here of the private character and career of the late judge—these are well known. At school, at college, at the Bar, and on the Bench, if not a spoiled child of nature and fortune, he was at least one endowed with natural and acquired qualifications which might well have excited the utmost envy of his fellows had they not been so gracefully borne.

Amongst those who stood by his graveside or attended the memorial service at Lincoln's Inn, there was an universal sense that not only a great lawyer, but a great man had gone to rest.

E. W. B.

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## II.—CORPORAL PUNISHMENT.

**T**WO Bills dealing with the subject of corporal punishment have been brought before Parliament during the present session. One of these Bills has been introduced into the House of Lords by Lord James of Hereford, and is distinctly and avowedly a Government measure. The other\* has been introduced into the House of Commons by Mr. Wharton, a well-known and influential private member. An examination of the contents of these two measures shows that they differ materially, both in their scope and object. Lord James's Bill relates exclusively to juvenile offenders, and its object is as far as possible to substitute corporal punishment for imprisonment in all cases of conviction for offences committed by young people. The scope of Mr. Wharton's Bill includes adults as well as juveniles; it is not primarily intended to substitute corporal punishment for imprisonment, and it aims at adding to the number of offences for which whipping or flogging may be inflicted. From this general description of the two Bills, it will be seen that the spirit which animates the authors of them is entirely different. The intention of Lord James's Bill is to mitigate the severity of the criminal law; the intention of Mr. Wharton's Bill is to make the criminal law harsher in its operations.

It is contended by the supporters of Lord James's Bill that the birching of juvenile offenders is a much more humane method of dealing with them than the method of imprisonment. Imprisonment, it is held, is a more severe penalty on the young, and carries more serious consequences with it than a resort to the birch-rod. It is much more difficult for a juvenile who has been in prison to get employment, than for

\* This article was written previous to the rejection of Mr. Wharton's Bill on March 28.—*ED. L. M. R.*

a youth who has merely been birched. Most employers of labour will not engage an ex-jail bird on any consideration whatever. Moreover, many workmen will refuse to work alongside a person who is known to have been in prison. The repugnance among the population as a whole to the ex-prisoner, whether old or young, is so marked that it is often exceedingly difficult for him to make a fresh start in life, be he ever so willing to do so. In addition to these considerations, it has also to be remembered that imprisonment, once it has been experienced, very often loses its terrors for the young. It is wonderful how quickly in most cases the young mind becomes accustomed to the isolation of the prison cell and all the other accompaniments of prison life. When a youthful offender enters prison for the first time, when the prison doors close upon him and shut him out from the outer world, his mind is filled with a dim and quaking dread of the punishment in store for him. And for the first few days of his incarceration he feels the loss of home, if he has one; he feels the solitude of the prison cell; in some cases his dread of being locked in is so great that his screams are heard all over the establishment. But in a wonderfully short time all these childish terrors pass away. He becomes reconciled and accustomed to his new surroundings. He adapts himself to the routine of prison life. He picks up all the petty details of prison discipline, and in a very brief period is a master of all the regulations to which he is required to conform. In several particulars these regulations are not so severe for him as for the adult prisoner. He is permitted to enjoy several little privileges withheld from the offender who has attained the age of manhood. He has more schooling, more exercise, less separate confinement: in a variety of ways he is necessarily subjected to a more relaxed kind of prison discipline. A juvenile offender cannot be treated with the same severity as a grown-up person. Prison regulations must be mitigated for the young. What is the result of all this? When the

sentence expires, and generally long before it comes to an end, imprisonment has lost all its terrors. An ordeal that had been looked forward to with fear and trembling, is looked back upon with very different feelings. The prison, if not regarded as exactly a place to be desired, is no longer considered as a place to be dreaded. The youth who has been once in prison knows the worst that society can do to him. That worst is not half so terrible as he had feared. Imprisonment, in fact, has lost most of its terrors for him. And if he does not fall a second time, it is certainly not the fear of further imprisonment which keeps him straight. In so far as the jail acts as a deterrent at all, it only acts upon young people who have never been inside prison walls. Its power as a deterrent is practically gone when once it has been used as a punishment. And, in my opinion, there is no surer way of bringing up a fresh generation of habitual criminals than by resorting to the repeated and indiscriminate imprisonment of the young. As a matter of fact, it is found, when the previous history of habitual criminals is carefully inquired into, that a large proportion of them were frequently imprisoned in their early youth. These repeated experiences of jail life taught them to despise imprisonment, and, so far from checking, had the effect of facilitating their permanent downfall.

It is facts of this kind, forcing themselves on the minds of judges and magistrates, which have led to the great decrease in the juvenile prison population. Other influences have, no doubt, been at work in a similar direction. Among these may be mentioned a growing sentiment of tenderness towards the young; a greater reluctance to convict them for petty and childish offences; a substitution of admonition, and fining, and surties for good behaviour for the futile penalty of imprisonment. In any case the decrease of the juvenile prison population is not to be attributed to a corresponding diminution in the proportions of juvenile crime. How far



juvenile crime has diminished, or whether it has diminished at all, is a very debatable point. One thing in connection with it at least is certain. It is a point which cannot be disposed of, as so many are inclined to dispose of it, by merely referring to the decreased numbers of juveniles in prison. This decrease, as I have just said, is owing to a variety of causes other than the decrease of crime.

Notwithstanding the great decrease in the juvenile prison population in the last generation, the object of Lord James's Bill is to enable magistrates and judges to reduce it still further by resorting to the birch, instead of the prison, as a means of punishment. According to prison law a juvenile offender means any young person under the age of sixteen. According to the prison returns for the year 1898-99, the number of juveniles under the age of sixteen committed on conviction to local and convict prisons amounted to 1722. But of this number ninety-four were girls, and as the new Bill does not apply to girls, female juvenile offenders will be sent to prison in the future as they have been in the past. If imprisonment is a bad thing for boys, it is universally admitted that it is even worse for girls. A girl, on her release from prison, is in a much more deplorable position as regards her future in the world than a boy. The public opinion of her own sex is extremely hostile to her, and her prospects at the best are dark and clouded. But Lord James's Bill provides no alternative to the prison in the case of all girls under sixteen whose offences are now dealt with by a sentence of imprisonment. It is easy to point out this defect in the Bill, but it is not so easy to suggest a remedy. I will, however, remark that, in Belgium, a remedy of some sort has apparently been found. On a recent visit to one of the largest Belgian prisons, I was informed that in Belgium no children under sixteen years of age are committed to prison. When the offence committed by the child is of such a character as would be visited with imprisonment in this country, the Belgian

magistrates regard such a child as a suitable candidate for a *maison de bienfaisance*. These institutions are educational agencies, under State control, somewhat similar to our industrial schools. I believe that they are in many respects better equipped, and worked upon more modern principles than our institutions of a similar kind. However this may be, it is to these establishments, and not to prisons, that children under sixteen are sent when the offence is so serious as to warrant it. I cannot help thinking that the time has now come when the State might safely abolish imprisonment for girls under sixteen, and put some other and more effective penalty in its place.

As regards the punishment of boys under sixteen, it remains to be considered how far whipping is likely to be a successful substitute for imprisonment. It is to be recollected that it is a punishment which is in operation to a very considerable extent under the existing law. According to the returns in the *Criminal Statistics* for 1897, 2840 juveniles were sentenced to whipping by Courts of summary jurisdiction. In most of the cases for which whipping was inflicted, the offenders had been convicted of such offences as simple larceny, theft from the person, malicious damage, theft of fruit, flowers, and so on. It is difficult to ascertain to what extent whipping has been an effective remedy for these offences against property. We have no records to show to what extent the punishment of whipping has prevented a repetition of the offence. There is a considerable feeling in the public mind that whipping is an excellent and effective remedy. But it is not easy to find any substantial basis for this firmly rooted belief. The only way to establish the value of whipping as a deterrent, is to show by facts and figures that it has the effect of preventing a juvenile from offending again. But no official facts and figures of this kind can be produced, because none have been collected. Everything is mere guesswork, surmise, and supposition. It is not altogether satisfactory to legislate on such

a basis. When preconceived ideas and common beliefs are brought to the test of facts and figures, it is often found that they are far from correct. And it is just possible that the common idea, that whipping is an efficacious method of dealing with juvenile offenders, is in some measure an erroneous idea. In any case it would have been well, before extending the scope of whipping legislation, to have made inquiries as to its value in those cases where it is now employed. It would have been well to ascertain what becomes of the two or three thousand juveniles who are now whipped from year to year under the existing law. We want to know how many of these juveniles come before the magistrates a second time or a third time; how many of them have afterwards, for fresh offences, to be committed to prisons, or to reformatory and industrial schools. If the proportion tried for fresh offences is small, it would go to prove the value of whipping as a penalty in the criminal code. But these elementary and essential facts have so far not been ascertained. At present we are completely in the dark as to the supposed value of whipping. We believe it is valuable, but we have got no proof to produce in support of our belief. We are going forward in the dark. We are legislating, no doubt, with the best intentions, but without a solid basis of fact behind us, and laws made upon this principle are not very satisfactory.

In all cases where judgments have to be formed, and there is not a great accumulation of admitted facts to appeal to, each man must fall back upon his own experience. Adopting this method, a wide experience of juvenile offenders teaches me that we must not expect much from repressive methods in dealing with juvenile crime. We must not expect that imprisonment will do much to repress it; we must not expect that where imprisonment has failed corporal punishment will succeed. We may hope that corporal punishment, if used wisely and mercifully, will have a less deleterious effect on the future of the young than a sentence of imprisonment.

But we must not imagine that it will be an effective remedy against juvenile crime. Juvenile crime springs from the wretched individual and social conditions in which so many children are born and have to live. In most cases the juvenile offender is either a stunted and enfeebled child, the offspring of vicious and degraded parents, or a homeless and orphaned wanderer in the streets of our great commercial cities. It is these wretched conditions which make him a criminal, and he will continue to be a criminal, no matter how often you whip or imprison him, until these conditions are removed. If we wish to diminish crime we must remove the causes of it. These causes, as far as juveniles are concerned, are the wretched circumstances in which so many are born and have to live. Do not let us imagine that punishment will remove these causes. Punishment, no doubt, must always retain its place in the social economy. But punishment will not supply the place of social amelioration. It is only social amelioration which will really diminish juvenile crime.

While I do not regard the corporal punishment clauses in Lord James's Bill as likely to be of much effect, it is desirable to point out that it contains other provisions which are a distinct step in advance. It is, for instance, not advisable to brand a child as a felon who has been convicted for some petty act of theft, and Lord James proposes that offences of a trifling nature, which can be disposed of by a whipping, or by sureties, or by payment of damages, are not to be regarded as a conviction for felony. This is a wise and humane provision in the Bill. It is equally wise and humane to permit a court of summary jurisdiction to remand a juvenile, pending his trial, to some place other than a prison, or to hand him over to some person who is willing to take charge of him. Hitherto it has been the custom to commit children to prison on remand. If it is mischievous to put convicted juveniles in prison, it is still more mischievous to put the unconvicted. If Lord James's Bill becomes an Act of Parliament, it will do

much to remedy this unsatisfactory state of things. Another provision in the Bill which may prove to be of great value, if properly administered, is a clause providing that a parent or guardian of a juvenile may be proceeded against at the same time as the child, if it is shown that the parent or guardian has neglected to exercise due control over the child. A provision of this kind will help to bring home a higher sense of responsibility to the minds of many parents in regard to the conduct of their children. It may have the effect of making many parents more careful of their children, and more directly concerned in keeping them out of harm's way. At the same time, this new power is a weapon which may easily be abused in the hands of indiscreet magistrates. In many cases it will be very difficult to say whether due control over the child has been exercised or not. "Due control" is an expression capable of a wide range of interpretation, and unless it is interpreted in each particular case with much judgment and discretion, this excellent clause in the Bill may break down when put in practical operation, and create a widespread feeling of hardship and discontent among parents as a whole. If such a state of mind were to be created by injudicious sentences, the clause would at once become a dead letter, and that portion of the Bill a failure.

I will now pass on to a consideration of some points in Mr. Wharton's Bill. The main object of Lord James's Bill, as has been pointed out, is to substitute whipping for imprisonment, in order to obviate, if possible, the dangers and disabilities which imprisonment involves. The primary object of Mr. Wharton's Bill, is not to substitute whipping for imprisonment, but to use it in addition to this penalty. This Bill also aims at extending the punishment of whipping to a number of offences which have hitherto been dealt with by other methods. Courts of quarter sessions are to be entrusted with powers as to the infliction of corporal punishment which they do not now possess. In cases of indecent assault on

children under thirteen years of age, these courts may sentence the culprit to fifteen strokes with the cat or birch in addition to any other penalty which it has now the power to inflict. The maximum number of strokes which an assize court may order is seventy-five, but of this maximum the offender can only receive twenty-five at a time. In order that the whole number may be inflicted, the whipping is to be spread over a period of six months ; and in order if possible to prevent the prisoner from collapsing or dying under the ordeal, the jailer and surgeon of the prison are to be present each time the flogging takes place. These are the principal provisions of the Bill.

In order to prove the need for a Bill intended to add to the severities of the criminal law, the author must show that the crimes he proposes to deal with are increasing in number, and that the existing law is inadequate to cope with them. In the next place, he must be prepared to prove that his proposals are likely to succeed where the existing enactments have failed. Let us see in what respect it will be possible for Mr. Wharton to do this. Will he be able to show, for instance that robbery, and assault with intent to rob, are increasing ? In face of the returns contained in the latest volume of the *Judicial Statistics for England and Wales*, it will be impossible to show that these crimes are becoming more prevalent. According to the returns, robbery and assault with intent to rob are steadily diminishing. For the last generation the population of England and Wales has been steadily increasing, yet, in spite of this continuous increase of the population, the crimes of robbery and assault for purposes of robbery have just as steadily diminished. This fact proves that the criminal law, as it stands, is an effective instrument of repression, and that fresh legislation is superfluous. Let us take another offence in Mr. Wharton's Bill for which flogging is prescribed, namely, burglary. When it is proved that the burglar is armed with any dangerous or offensive weapon or instrument

whatsoever, the judge may inflict a sentence of corporal punishment. Within the last twenty years it is, no doubt, true that burglary of all kinds has increased to the extent of about a hundred cases. But the total number of cases in England and Wales is comparatively small. During the five years ending 1897, they only amounted to an annual total of 474 cases for trial. In 1897, out of the whole population of England and Wales, only 156 offenders were convicted of burglary. Is it necessary to add to the rigours of the criminal law on account of this infinitesimal section of the population? I venture to think it is not. Let us take another offence, mentioned in the first schedule of Mr. Wharton's Bill, the crime of garrotting. This crime is included in the *Judicial Statistics* along with a number of others, under the general heading of "felonious wounding." There has been no appreciable change in the number of these offences for the last twenty years. In the year 1897 there were only 101 convictions for felonious wounding; most of these cases had nothing to do with what is known as garrotting. This is proved by the fact, that in not one single instance did the judges order the offenders to be whipped, although they have now the power to do so under the provisions of the Garrotting Act.

The schedules in Mr. Wharton's Bill defining the offences for which whipping or flogging may be resorted to refer to two different classes of offences. The first class consists of offences against the person for purposes of robbery, or readiness to offend against the person for purposes of robbery: the second class refers more particularly to sexual offences against the person. I think I have shown that the number of offences of the first class, or the increase of some of them, is not sufficiently serious to warrant fresh legislation. Let us now see how matters stand with regard to the second class, that is to say, sexual offences. According to the official returns, it undoubtedly appears that such crimes as rape and

indecent assaults on females exhibit a tendency to increase. In the quinquennial period (1876) the number of persons tried for these offences amounted on an annual average to 484. Since that date the numbers have been slowly but not steadily increasing, and, according to the latest returns, ending with the year 1897, the numbers tried per annum amounted to an average of 632. In reading these figures it is to be recollected that the population has increased considerably in the last twenty years. But even after making deductions on this account, it is to be admitted that the returns point to an increase in rape and indecent assaults on females, which is greater in proportion than the increase of the general population. On the other hand, offences relating to the defilement of girls are diminishing, not only absolutely but in proportion to the population. The annual average of such offences for trial in the case of girls under thirteen was 228 in 1884; according to the last returns the annual average had sunk to 122.

In connection with the figures it is very remarkable to note that, while offences against children are decreasing, offences against adults are increasing. It would be natural to suppose that if sexual offences are increasing at all they would increase all round, or that if they are decreasing at all they would decrease all round. The same proclivities which would lead certain depraved sections of the population to offend against women would also lead them to offend against children. But according to the returns this does not appear to be the case. Offences against women have gone up, whilst offences against children are going down. It is very difficult to find an explanation for this anomaly. It is difficult to believe that there is much in the statement sometimes made, that women are now more ready to bring charges of a sexual character against men than used to be the case some twenty or thirty years ago. It is very difficult to bring forward any valid sort of proof in support of such a statement. On the other hand,



it is a very significant fact that the proportion of acquittals in charges of rape is something enormous. In the year 1897 the number of cases for trial for this offence amounted to 117: out of this total only fifty offenders were convicted; in the remaining sixty-seven cases the prisoner was either acquitted or no true bill was found. These returns show how easy it is to make the most serious accusations, and how difficult it is to substantiate them when the accused has to stand his trial before a jury of his fellow-countrymen.

One thing, anyhow, these figures make perfectly clear. They show that the element of error in such charges is enormous. Where this element of error is so great it is clearly inexpedient, in cases where a conviction is obtained, to resort to such an extreme penalty as flogging. If so many charges are made which cannot be substantiated when brought to the test of legal proof, is it not likely that in some of those cases where the prisoner is convicted he may not be guilty after all? I can only speak from my own experience, and I do not wish to generalize from it. But I have always found that a larger proportion of prisoners convicted of sexual offences denied these charges than was the case with prisoners convicted of other kinds of crime. I do not say for one moment that these denials represented the facts, but I could not help coming to the conclusion that many men were convicted who did not deserve to be. Unless it can be shown that the existing law is utterly inadequate, and that the number of sexual offences is so great as to be a serious menace to the community as a whole, it would not be at all a wise thing to add corporal punishment to the penalties on the statute-book which deal with such offences. According to the latest returns—the returns for 1897—the total number of convictions for rape and indecent assault only amounted to a grand total of 128 in a population of thirty millions. Mr. Wharton says that his Bill is drawn up in response to the presentments of grand juries at sessions and assizes as to the desirability of

flogging for indecent assaults on females. Every right-minded man regrets and deplors these assaults, and regards the perpetrators of them with the utmost indignation. But it is impossible for us to shut our eyes to the fact that such assaults are very rare occurrences, that the element of doubt around them is always very great, that they constitute no grave danger to the community, and that the remedy of flogging which Mr. Wharton proposes is perhaps no remedy at all.

Before the legislature commits itself to such a big step as the extension of flogging, it must be established beyond the possibility of doubt by the advocates of this method of punishment that it will be more successful than the punishments already in existence. It must be proved that flogging will deter where imprisonment fails. If we were to give way to mere feelings of horror and detestation with regard to these sexual crimes, we should probably go beyond flogging, and demand the penalty of death itself. But the laws of the land cannot be framed to satisfy the blind demands of outraged feeling; they must be framed in accordance with sound judgment and wise policy. The legislator must consider what are likely to be the permanent effects of a law. He must consider whether the proposed law is likely to attain its object. He must say to himself, Is there any evidence to show that this flogging Bill will succeed where other remedies have failed? This is the point of view which must be reached before we can begin to form a reasonable judgment.

When we reach this point, it must be admitted by everybody that it will be very difficult to produce satisfactory evidence to show that flogging is more likely to be successful than imprisonment. In fact, most of the evidence points the other way. If flogging is such a successful remedy for crime, and such a terror to would-be evil-doers, why is it that, after centuries of use, it is now being slowly abandoned by the

civilized world? During the present century the practice of flogging has been restricted as a means of punishment, not in one country or in two countries, but throughout the whole of civilized Europe. Why has this means of punishment been narrowed, restricted, and abolished? If it had been successful it would have been retained. It has been obliterated from the statute-book in so many instances because it has been proved to be a failure. It has dawned upon the mind of Europe that corporal punishment, that the birch, the cat, and all other instruments of physical torture, are no protection to society against the criminal classes. It is seen, on the contrary, that these instruments of torture breed in the heart and mind of the community that very spirit of callousness to human suffering which produces crime. The legislator must be careful not to demoralize the community as a whole in his efforts to mete out punishment to an exceptional and minute class of offenders. But, apart from this consideration, there is no proof whatever that flogging is a deterrent: there is no proof that it prevents the offender from repeating the offence: there is no proof that it prevents others similarly inclined from following in his steps. The history of flogging as a means of prison discipline is a valuable illustration of this fact. According to the latest prison returns, flogging has been practically abolished in English convict prisons for prison offences. It used to be one of the most common methods of punishing prisoners. What has been the result of this immense change in prison discipline? It has resulted in a vast improvement of the prison population in the matter of obedience to prison law. In proportion as flogging has decreased for prison offences the conduct of the prison population has improved. Violence has diminished, disorder has diminished, idleness has diminished, and the prisoners in our prisons are producing twenty-five per cent. more work for the State than they produced when flogging flourished in their midst. I do not pretend for a moment that this is all

a question of cause and effect ; but it is at least a proof that the decrease of flogging has been accompanied by a growth of all that is best and healthiest in prison life. It gives no countenance whatever to the idea that flogging is a deterrent in any shape or form. It points, on the contrary, to the conclusion that the less flogging is resorted to the better it is for the community as a whole.\*

W. D. MORRISON.

### III.—THE COMMISSION OF LIEUTENANCY IN\* COUNTIES.

TWO institutions of our history may be traced to the laws of Edgar and Canute, and probably had been customary much earlier—viz. (1) the frankpledge, supplemented by the hue and cry ; (2) the *fyrð*, or national militia. Every man capable of bearing arms was bound, at his own expense, to provide arms and to aid in suppressing riots, as well as in defending the realm against invasion. This was one of the three obligations of the *trinoda necessitas*, which lay on every owner of land ; the other two being to maintain fortifications and repair bridges.† This general levy of all able-bodied men in each county had a double aspect. As a civil force, it was the *posse comitatus* which the Sheriff was entitled to call on to suppress riots, the obligation being closely connected with the keeping of watch and ward, and of following the hue and cry against criminals. In its other

\* I am glad to see that the House of Commons has taken the point of view advocated in this article with respect to Mr. Wharton's Bill. Its rejection was moved in an able speech by Mr. Lloyd Morgan, and, after a discussion of some length, in the course of which the Home Secretary opposed fresh flogging legislation, the Bill was defeated by a majority of 123.—W. D. M.

† Stubbs, *Const. Hist.*, i. 76.

aspect it was a military force, and was called out under the Sheriff to defend the realm in civil war or against foreign foes. It was only liable to serve in the kingdom, and, except in case of invasion, only in its own county. This was the only military system known to our early ancestors. After the Conquest the feudal system of military tenure threw the militia into the shade, added to which both William the Conqueror and early Angevin kings supplemented the feudal system by mercenary troops. The ancient national militia, however, still subsisted, and was completely resuscitated in 1181 by the famous "Assize of Arms" issued by Henry the Second. Thus the two military systems, the ancient and the feudal, continued to run together *pari passu*, but without coalescing. They were, however, amalgamated in 1217, during the minority of Henry the Third, the Sheriff of Berkshire being directed by writ to bring up the whole force within his county, both the feudal levy and the militia levy, or *jurati ad arma* as the latter were then called. The Sheriff of the county, it will be noticed, was in supreme command. By the Statute of Winchester (13 Edw. I. c. 6), 1285, it is commanded that "every man have in his house harness for to keep the peace after the ancient Assize, that is to say, every man between fifteen years of age and sixty years shall be assessed and sworn to armour according to the quantity of their lands and goods;" and again, "in every hundred and franchise two constables shall be chosen to make the view of armour, and the said constables shall present before justices assigned when they shall come into the county such defaults as they shall have found about armour;" and again, "from henceforth let sheriffs take good heed, and bailiffs within their franchises and without . . . that they shall follow the cry with the country and according as they are bounden do keep horses and armour so to do." Thus from very early days the Sheriff, succeeding to the Earl, was the chief officer under the

king in every county, deriving his title from the two Saxon words "shire" and "reeve," the bailiff or steward of the division; he kept the king's peace, and organized a sufficient force to protect the county against foreign invasion. But the Plantagenet and Tudor kings from time to time had commissioned officers for the purpose of "arraying" the inhabitants of several counties into a large body for the defence of the realm. The necessity of the case seems to have been the only justification for a sovereign to issue these commissions of Array. But these commissions undoubtedly were the origin of the present Lord Lieutenancy. We are not aware that a form of such commission has ever yet been published in the English language, and we therefore present the reader with our translation of a commission from Rymer\* issued by Henry VIII. in 1545. It is as follows:—

"CONCERNING ARRAY, AND THE CAPTAIN-GENERAL  
AGAINST THE FRENCH.

*"The King to his well-beloved cousin and councillor Thomas Duke of Norfolk Treasurer of England, Greeting,  
, "Know ye that for certain causes and considerations Us specially moving Trusting in your fidelity prudence firmness and industry We have assigned to you and by the tenor of these Presents We give and commit to you full power and authority to call together and collect all and singular our lieges and subjects within our counties of Essex, Suffolk, Norfolk, Hertford, Cambridge, Huntingdon, Lincoln, Rutland, Warwick, Northampton, Leicester, and Bedford as well within liberties as without.*

*"And to array and try them, and them well and for purposes of defence to cause to be armed and safeguarded, and to take and supervise views and displays of them in suitable places according to your sound discretion from time to time And also*

\* Rymer, *Fœdera*, vol. 15, p. 75.

*We assign depute and ordain you by these Presents Our Lieutenant and Captain-general of all and singular captains, vice-captains, men at arms, armourers, bowyers, and of all others whomsoever in the aforesaid counties being retained or to be retained by you, against our enemies the French to be disciplined and armed, to be led ordered and governed, and to fight and to wage war with these French men.*

*"And to ordain, enact, and establish ordinances and statutes for the good rule of the army and armed force aforesaid, and to make proclamations, and decree execution in due course.*

*"And to chastise and imprison whomsoever you shall find disobedient and contravening and to consider the freeing of those imprisoned and to do and fulfil all other things for the good rule of the armed force and army aforesaid according to your sound discretion.*

*"And therefore we command you that concerning the aforesaid matters you shall diligently consider and do and carry them out with effect.*

*"And we give firmly our commands to all and singular our Dukes, Marquises, Earls, Barons, Knights, justices, mayors, sheriffs, bailiffs, stewards, constables, captains and vice-captains of soldiers, and other Our officers ministers and subjects whomsoever within liberties as without, by the tenor of these Presents, that they shall be forwarding and assisting and aiding likewise and diligently obedient in all things to you in doing and carrying out the matters aforesaid.*

*"In witness whereof &c.*

*"These Presents are to be in force until the Feast of St. Michael the Archangel next ensuing. Witness the King, at Greenwich, the 14th day of June."*

A similar commission was directed, dated the same day as the preceding, "To our well-beloved cousin and councillor, Charles, Duke of Suffolk," Lord President of the King's Council and Grand Master and Steward of the King's House-

hold, with regard to the counties of Kent, Sussex, Surrey, Southampton, Wilts, Berks, Oxford, Middlesex, Bucks, Worcester, and Hereford, and the City of London, as well within liberties as without. And the same, also dated the same day, and directed "To our well-beloved and faithful councillor, John Russell, Knight, Lord Russell," Keeper of the King's Privy Seal, with regard to the counties of Dorset, Somerset, Devon, Cornwall, and Gloucester, and the Principality of South Wales and North Wales, and the Marches of the same, as well within liberties as without. It will be observed that these commissions of Array indirectly undermined the power of the Sheriffs of the respective counties mentioned in the commissions, for they supplanted the old constitutional authority, originally elected by the freeholders, by a new officer entirely dependent on the king, and who was empowered to levy and command the able-bodied men of the county in lieu of the legitimate head, viz. the Sheriff.

But it was reserved for Edward the Sixth to go a step further. By an Act (3 & 4 Edw. VI. c. 5) passed in this reign (1549), "An Act for the punishment of unlawful assemblies and risings of the King's subjects," after enacting that it should be high treason for twelve persons or above, being assembled together, to attempt to kill or imprison any of the king's council, or to alter any laws, and to continue together by the space of an hour, being commanded by a justice of peace, mayor, sheriff, etc., to return, and it should be felony for twelve persons or above, to practise to destroy any park, pond, conduit, or dove-house, or to have common or way in any ground, or to pull down any houses, barns, or mills, or to burn any stack of corn, or to abate the rents of any lands, or the prices of any victual, and to continue together an hour, being commanded by a justice of peace, sheriff, bailiff, etc., by proclamation to return, proceeds to declare (s. 7) that "it shall be lawful to any person or persons



having the king's commission or letters from his highness or his privy council to raise and assemble the king's loving subjects in manner of war to be arrayed . . . to suppress, apprehend, and take the said persons unlawfully assembled." And again it declares (s. 13) "that if the king shall by his letters patent make any *lieutenant* in any county or counties of this realm for the suppressing of any commotion, rebellion, or unlawful assembly that then as well all justices of peace of every such county, and the sheriffs and sheriff of the same, as all mayors, bailiffs, and other head officers, and all inhabitants and subjects of any county, city, borough, or town corporate . . . shall, upon the declaration of the said letters patent and request made, be bound to give attendance upon the same *lieutenant* to suppress any commotion, rebellion, or unlawful assembly."

We here have the county Lieutenant by name. Probably such Lieutenant was not appointed for every county, nor was the office of necessity for life ; but, so far as we are aware, this Act is the first Statute in which the Lieutenant of the county is spoken of.\* It will also be noticed that similarly to a commission of Array the appointment of the King's Lieutenant in a county is by letters patent. Blackstone† says : "About the time of King Henry the Eighth, or his children, Lieutenants began to be introduced, as standing representatives of the Crown, to keep the counties in military order ; for we find them mentioned as known officers in the Statute 4 & 5 Ph. and M. c. 3, though they had not been then long in use, for Camden speaks of them in the time of Queen Elizabeth, as extraordinary magistrates constituted only in times of difficulty and danger ; but the introduction of these commissions of Lieutenancy, which contained in substance the same powers as the old commissions of Array, caused

\* Strype, in his *Memorials*, says that Lords-Lieutenant were first appointed in the above year (1549). .

† Vol. i. c. 13.

the latter to fall into disuse." Blackstone does not seem to be aware of the rather considerable mention of Lieutenants in the Act of Edward the Sixth, just quoted, nor of a subsequent mention of them in a statute of Queen Mary (1 Mar., st. 2, c. 12), passed in 1553, and earlier, of course, than the Statute he quotes. Section 12 of the Statute of Mary enacts that "if the Queen's Highness shall by Her letters patent make any Lieutenant in any county or counties of this realm for the suppressing of any commotion, rebellion, or unlawful assembly," then all justices, sheriffs, mayors, etc., shall be bound to give attendance to the Lieutenant to suppress the commotion, etc. Section 20 of the same Statute decrees that no Lieutenant shall constitute under him or in his place any deputy. This Act was passed only for the then present Parliament, but was continued throughout their reign by Philip and Mary; it was re-enacted, by reference, by Queen Elizabeth, and finally repealed in 1863, after having been obsolete for many years. The Statute 4 & 5 Ph. and M. c. 3, referred to by Blackstone, makes mention of the "Lord Lieutenant" once, but by no means clearly states his duties. This, however, is the first time that the expression *Lord Lieutenant* occurs in the Statute-book.

Holinshed,\* who wrote about 1580, says, in speaking of the English counties, "over each of these shires in time of necessity is a several Lieutenant chosen under the Prince; who being a nobleman of calling hath almost regal authority over the same shire for the time being in many cases which do concern his office; otherwise it is governed by a Sheriff."

During the Wars of the Roses and the reigns of the Tudors, troops were raised in the most irregular manner, constitutional rights were ignored and forgotten, the above-named commissions of Array were issued, and the practice of impressing men to act as soldiers was enforced under those commissions. In fact, it began to be assumed that the

\* *Chronicles*, i. 155.

Crown had a right to impress men for the army in the same way as it (really) had of impressing mariners for the navy. It is clear from the Acts of Parliament of the reign of Queen Elizabeth\* that impressment was then commonly considered to be one of the prerogatives of the Crown.

Shakespeare makes Falstaff say ("Hen. IV.," part i., act iv., sc. 2) : "I have misused the king's press damnably. I have got in exchange of 150 soldiers 300 and odd pounds. I press me none but good householders, yeomen's sons : inquire me out contracted bachelors, such as had been asked twice on the bans ; such a commodity of warm slaves as had as lief hear the devil as a drum ; such as fear the report of a culverin worse than a struck deer, or a hurt wild fowl . . . and they have bought out their services ; and now my whole charge consists of . . . such as indeed were never soldiers, but discarded unjust serving men, younger sons to younger brothers, revolted tapsters, and ostlers trade-fallen ; the cankers of a calm world and long peace ; ten times more dishonourably ragged than an old-faced ancient ; and such have I to fill up the rooms of them that have bought out their services ; that you would think I had 150 tattered prodigals lately come from swine-keeping. . . . Nay, and the villains march wide betwixt the legs, as if they had gyves on ; for indeed, I had the most of them out of prison."

The old Acts of Henry the Eighth (33 Hen. VIII. c. 5) concerning the keeping of war-horses, and of Philip and Mary (4 & 5 Phil. and Mar. c. 2) concerning the keeping of horses, armour, and weapons, were repealed in the reign of James the First, in the years 1604 and 1623, but commissions were issued to register and muster all persons able to provide horses, arms, or soldiers, and to select a convenient number of such persons to serve for the defence of the Crown. These commissions assumed, by the end of the sixteenth century, a quasi-permanent form under the Lieutenants of the counties,

\* 35 Eliz. c. 4 ; 39 Eliz. c. 21 ; 43 Eliz. c. 9.

to whom by degrees they were directed ; and the persons serving under them were known as Train-bands, and were mustered annually.

During the reign of Charles the First the commissions of muster, the exactions enforced by the Lieutenants of counties, and illegal impressment, were felt to be grievances, and were complained of by Parliament. The Parliament, moreover, was extremely unwilling to leave the command of the Militia under the control of the Crown, a power exercised by means of the Lieutenants of counties. This question was one of the principal matters in dispute at the time of the rupture between Charles the First and Parliament.

The Commons, in 1642, passed several votes derogatory to the Royal prerogative ; having ordered the whole kingdom to be placed in a posture of defence, they proceeded to order all Lords-Lieutenant of counties, constituted by the King's commission, to bring in their commissions to be cancelled, as illegal. They declared that whosoever should execute any power over the Militia by virtue of a commission from the King without the consent of Parliament was to be deemed "a disturber of the peace of the kingdom." They wanted to have the Militia absolutely in their power, that they might be able to seize the King's person in any part of the kingdom.

After the Restoration considerable changes took place in the military system of the country. Impressment for the army had been abolished by the Parliament of Charles the First, but the new Parliament of Charles the Second passed a very important Act in 1662 (13 & 14 Car. II. c. 3), declaring that the whole right in, and power over, the Militia was solely in the King, and that neither of the Houses of Parliament could or ought to pretend to any right in, or power over, the same. Further, that the King might from time to time, as occasion should require, issue forth several commissions of Lieutenancy to such persons as he should

think fit to be his Majesty's Lieutenants for the respective counties, cities, and places of England, Wales, and Berwick-upon-Tweed; that such Lieutenants should have full power and authority to call together all such persons as by the said Act directed, and to arm and array them, also to form them into companies, troops, and regiments, and, in case of insurrection, rebellion, or invasion, to lead them, both within the several counties, cities, and places for which they should be respectively commissioned, as also into any other counties, cities, and places, as they might be directed by the King, for suppressing all insurrections, rebellions, and invasions. The same Act gave them power to appoint fit persons to be colonels, majors, captains, and commissioned officers for the Militia, and to present to the King the names of such persons as they should think fit to be Deputy-Lieutenants, and with his Majesty's approbation to give them their deputations accordingly; further, that the said Deputy-Lieutenants, or any two or more of them, should have power from time to time to train and lead the persons armed and arrayed as before mentioned.

All this, it should be observed, refers to the Militia only, and has no concern whatever with the question of a Standing Army, forbidden by the Declaration of the Bill of Rights. The rebellion of 1745 brought into notice the general inefficiency of the Militia; and in 1757 an Act\* was passed by which the force was reorganized on nearly the same basis as that on which the balloted Militia now rests. Other Acts were subsequently passed, making more or less modifications in the status of the Militia, until 1871, when it was determined to combine the regular and auxiliary forces in one organization in connection with different territorial districts. In furtherance of this scheme, an Act (34 & 35 Vict. c. 86) was passed, by which the command of auxiliary forces, with all the

\* 30 Geo. II. c. 25, amended by 31 Geo. II. c. 26, 32 Geo. II. c. 20, and 33 Geo. II. cc. 22, 24.

powers of the Lieutenants of counties, and those of the Lord-Lieutenant in Ireland in relation to any of such forces (except those relating to the raising of the Militia by ballot), were re-vested in the Crown, and declared to be exercisable through a Secretary of State, or any officers to whom her Majesty, with the advice of a Secretary of State, might delegate such command and powers. This Act may be looked upon as a formidable blow to the military power of Lords-Lieutenant.

By 45 & 46 Vict. c. 49 (the Militia Act of 1882), the Lord-Lieutenant may create persons to be his Deputy-Lieutenants with the approval of her Majesty. The commission of a Deputy-Lieutenant is not vacated by the Lord-Lieutenant ceasing to be such. The Lord-Lieutenant with the approval of her Majesty may appoint any Deputy-Lieutenant to act for him as Vice-Lieutenant during his absence from the county, sickness, or other inability to act. Her Majesty may appoint any fit person to be a Lord-Lieutenant ; \* but in the case of a Deputy-Lieutenant the following qualifications are requisite :—

(a) He shall be a peer of the realm or the heir apparent of such a peer, and have a place of residence within the county for which he is appointed ; or

(b) He shall be in possession for his own benefit of an

\* The uniform worn by the Lord-Lieutenant is a tunic of scarlet cloth with silver-plated buttons having a sword and baton crossed on them, emblematical of the military and civil capacities ; blue cloth trousers with silver lace stripe, cocked hat with white plume and red feathers, sword and sash, also gilt spurs. For English and Welsh counties embroidery of oak-leaf and acorn ; for Scotch, the thistle ; for Irish, the shamrock.

The uniform of Deputy-Lieutenants is a tunic of scarlet cloth with silver-plated buttons having the crown and wreath ; blue cloth trousers with silver lace stripe ; cocked hat with white plume ; sword, and waist plate of silver with badge. For English counties, oak-leaf wreath and rose in the centre ; for Welsh counties, oak-leaf wreath and Prince of Wales's plume in the centre ; for Scotch counties, thistle wreath and gilt metal thistle in the centre ; for Irish counties, shamrock wreath, and shamrock leaf in the centre, with a spray of shamrock on each petal. The embroidery is the same as for the Lord-Lieutenant according to the county. Moreover, the devices or badges peculiar to counties are often worn on the collar of the tunic.

estate for the life of himself or another, or of some greater estate, in land in the united kingdom of the yearly value of not less than two hundred pounds ; or

(c) He shall be the heir apparent of some person who is in possession for his own benefit of such an estate as above mentioned ; or

(d) He shall be possessed or entitled, at law or in equity, in possession for his own benefit, for the life of himself or another, or for some greater interest, of or to a clear yearly income arising from personal estate within the united kingdom of not less amount than the yearly value of an estate in land above mentioned ; and the clear yearly income arising from any such personal estate shall be admitted in whole or in part of a qualification arising from the possession of an estate in land.

The clerk of general meetings of Lieutenancy causes to be published in the *London Gazette* the names of the persons appointed Deputy-Lieutenants with the dates of their commissions. If any person acts as Deputy-Lieutenant without being duly qualified, he is liable to forfeit the sum of £200, but his acts shall nevertheless be deemed valid. Lords-Lieutenant and Deputy-Lieutenants when acting in the execution of the Militia Acts are protected with regard to notice of action, venue, tender of amends, and payment into court, and other matters, as if they were justices of the peace.

It will be observed that owing to the above-mentioned Act of 1871, the position, duty, and responsibility of a Lord-Lieutenant, and by inference of his Deputy-Lieutenants, has been so considerably altered that the office is little more than honorary. The Lord-Lieutenant is generally appointed the *Custos Rotulorum* of the county, but of course the duties and appointments are wholly distinct ; the latter being the first civil officer of the county, while the Lord-Lieutenant is the first military officer of the county. County magistrates are

usually made on the recommendation of the Lord-Lieutenant, but this is merely a matter of courtesy. There is a Lord-Lieutenant for each of the Ridings of the county of York. The City of London has a commission of Lieutenancy, and is a separate county for purposes of the Militia, and the Commissioners of Lieutenancy are the Lieutenant of the county of the City of London. The qualifications above mentioned with regard to Deputy-Lieutenants do not apply to the City of London. The Lord Mayor is the head of the city lieutenancy.

The appointment of Lord-Lieutenant is rarely bestowed upon any but a supporter of the Minister of the day, and the office is held during pleasure. Yet it is not the practice to change Lords-Lieutenant with every change of ministry; nevertheless, there have been instances in which what was deemed unwarrantable political opposition to an administration on the part of a Lord-Lieutenant has led to his dismissal.

The office of Lord-Lieutenant is presumably the highest in each county; and, therefore, he takes precedence of the Sheriff, although this is a point on which at times there is a good deal of controversy. The question of precedence as between the Lord-Lieutenant and Sheriff was dealt with at great length, and in a most able manner by Mr. Davenport, under-sheriff of Oxford, in a paper which was printed in the appendix to the Report of the Select Committee on Sheriffs which sat in 1888. The following extract from the Report will be of interest to our readers:—

“It may be interesting to refer to the social status of the High-Sheriff. Ancient learned text-writers, including Blackstone, have asserted not only that the Sheriff ‘as keeper of the Queen’s peace, both by common law and special commission, is the first man in the county,’ but also that he is ‘superior in rank to any nobleman therein.’ From this it has frequently been presumed that the High-Sheriff gained precedence within his own county over dukes and all ranks of the peerage, including the Lord-Lieutenant of the county.



General favour was accredited for such a view of the Sheriff's precedence by the late Mr. Disraeli, afterwards Earl of Beaconsfield, having stated in his book *Lothair*, 'There is no doubt that, in the county, the High-Sheriff takes precedence of every one, even the Lord-Lieutenant' (vol. II. p. 78). But with all deference to such an authority as the late Prime Minister, it is an established fact, recognized by the late Garter King at Arms, Sir Charles Young, that the Lord-Lieutenant, as *lieum tenans* of the Sovereign, has precedence of every one in the county, and that the High-Sheriff does not, under any circumstances, precede the Lord-Lieutenant, nor socially take precedence of any peer. The fact that the Sheriff presides at a county meeting involves no question of precedence, because the Sheriff having convened the freeholders of his county, who owe suit and service at his County Court, necessarily presides over them. Sir Bernard Burke also says (*Reminiscences*, 1884), 'Neither the Lord-Lieutenant of a county nor the High-Sheriff is assigned any place in the scale of precedence, and, consequently, neither derives any social precedence from the office he holds. A particular place on the scale of precedence is an honour derived from the Crown, or Parliament, or confirmed by authorized usage, and can no more be interfered with than the right to the dignity of a peerage which a royal patent has conferred. Between the two, the Lord-Lieutenant of a county, and the High-Sheriff, the higher local position appertains, I think, to the Lord-Lieutenant of a county.'

"The meaning of the quotation from Blackstone depends upon the construction of the word 'nobleman.' The view favouring the Sheriff's precedence was derived from the dictum of Chief Justice Coke, in the case of *Chum v. Prot* (*Sheriff of London*), Rolle's *Report*, i. 237, in which the Chief Justice said: 'Anciently it was the Earls who exercised this office of sheriff, and then they held the office as long as they wished, but afterwards, when estates for life and of inheritance were granted, shrievalties were granted, and sheriffs have the same power the ancient earls had, of which dignity there were some relics to that day, for instance, the "White Wand," and the patent of the grant of this office is in these words, *Commisimus vobis custodiam comitatus*, and the sheriff takes precedence of every nobleman during office (*il prist le lieu de chascun noble home durant l'office*).' But the truth is, that the expression *noble home*, when used by the Chief Justice in James the First's reign (1616), implied nothing more than that the sheriff was the head of the

commonalty of the county; because, at that time, the term 'nobleman' was not confined to the peerage, but applied to knights and gentlemen below the peerage. This is proved by the following sentence in Camden's *History of Elizabeth* (3rd edition, page 29), under the date of 1559: 'Cuthbert Scot, of Chester, Richard Pate, of Worcester, and Thomas Goldwell, of St. Asaph, voluntarily departed the land, and also certain nuns, as did likewise afterwards some *noblemen*; of whom those of better note were Henry Lord Morley, Sir Francis Inglefield, Sir Robert Peckham, Sir Thomas Shelley, and Sir John Gage.' And it is further proved by Coke's own interpretation of the word 'nobleman' in his note (2nd *Institute*, page 583), upon a passage in the Statute 35, Edward I., in which note Coke says: 'Knights of the Shire and other gentlemen of the House of Commons are included under these words, *aliorum nobilium*; for *Nobilitas est duplex, superior et inferior*. Superior belongeth to the Lords of Parliament, and inferior to knights and gentlemen of name and blood, who are in this Act termed *nobiles*.'

Atkinson, in his work on Sheriffs, observes that "he still retains a great part of his primary dignity, as may be seen partly from this, namely, that he has a right of precedence within his county of every nobleman during the time that he is in office." Churchill, on the same subject, says, "The Sheriff occupied very much the position of the king's steward in his own county, and at this day the Sheriff takes precedence of every nobleman in the county during his tenure of office and is a grand conservator of the peace."

Nevertheless, on the authorities so fully set out by Mr. Davenport, it would seem that the Lord-Lieutenant and not the Sheriff is the first man in the county.

SHERSTON BAKER.

## IV.—THE HISTORY OF ASSUMPSIT.\*

(Continued from p. 153.)

## II.—IMPLIED ASSUMPSIT.

NOTHING impresses the student of the Common Law more than its extraordinary conservatism. The reader will easily call to mind numerous rules in the law of Real Property and Pleading which illustrate the persistency of archaic reverence for form and of scholastic methods of interpretation. But these same characteristics will be found in almost any branch of the law by one who carries his investigations as far back as the beginning of the seventeenth century. The history of Assumpsit, for example, although the fact seems to have escaped general observation, furnishes a convincing illustration of the vitality of mediæval conceptions.

We have had occasion, in the preceding part of this paper, to see that an express *assumpsit* was for a long time essential in the actions of tort against surgeons or carpenters, and bailees. It also appeared that in the action of tort for a false warranty, the vendor's affirmation as to quality or title was not admissible, before the time of Lord Holt, as a substitute for an express undertaking. We are quite prepared, therefore, to find that the action of Assumpsit proper was, for generations, maintainable only upon an express promise. Furthermore, Assumpsit would not lie in certain cases, even though there were an express promise. For example, a defendant who promised to pay a sum certain in exchange for a *quid pro quo* was, before Slade's case,† chargeable only in Debt unless he made a second promise to pay the debt.

\* Reprinted by permission from vol. ii. of the *Harvard Law Review* [1888]. The author has enlarged the notes in a few instances. These additions are enclosed in brackets.

† 4 Rep. 92 a.

It was only by degrees that the scope of the action was enlarged. The extension was in three directions. In the first place, *Indebitatus Assumpsit* became concurrent with Debt upon a simple contract in all cases. Secondly, proof of a promise implied in fact, that is, a promise inferred from circumstantial evidence, was at length deemed sufficient to support an action. Finally, *Indebitatus Assumpsit* became the appropriate form of action upon constructive obligations, or quasi-contracts for the payment of money. These three developments will be considered separately.

Although *Indebitatus Assumpsit* upon an express promise was valuable so far as it went, it could not be resorted to by plaintiffs in the majority of cases as a protection from wager of law by their debtors. For the promise to be proved must not only be express, but subsequent to the debt. In an anonymous case, in 1572, Manwood objected to the count that the plaintiff "ought to have said *quod postea assumpsit*, for if he assumed at the time of the contract, then Debt lies, and not Assumpsit; but if he assumed after the contract, then an action lies upon the *assumpsit*, otherwise not, *quod* Whiddon and Southcote, JJ., with the assent of Catlin, C.J. *concesserunt*." \* The consideration in this class of cases was accordingly described as a "debt precedent" † The necessity of a subsequent promise is conspicuously shown by the case of *Maylard v. Kester*.‡ The allegations of the count were, that, in consideration that the plaintiff would sell and deliver to the defendant certain goods, the latter promised to pay therefor a certain price; that the plaintiff did sell and deliver the goods, and that the defendant did not pay according to his promise and undertaking. The plaintiff had a verdict and judgment thereon in the Queen's Bench; but the judgment was reversed in the Exchequer Chamber "because Debt

\* Dal. 84, pl. 35.

† *Manwood v. Burston*, 2 Leon. 203, 204; *supra*, p. 149.

‡ *Moore*, 711 (1601).

lies properly, and not an action on the case; the matter proving a perfect sale and contract."

What was the peculiar significance of the subsequent promise? Why should the same courts which, for sixty years before Slade's case, sanctioned the action of Assumpsit upon a promise in consideration of a precedent debt, refuse, during the same period, to allow the action, when the receipt of the *quid pro quo* was contemporaneous with or subsequent to the promise? The solution of this puzzle must be sought, it is believed, in the nature of the action of Debt. A simple contract debt, as well as a debt by specialty, was originally conceived of, not as a contract, in the modern sense of the term, that is, as a promise, but as a grant.\* A bargain and sale, and a loan, were exchanges of values. The action of debt, as several writers have remarked, was a real rather than a personal action. The judgment was not for damages, but for the recovery of a debt, regarded as a *res*. This conception of a debt was clearly expressed by Vaughan, J., who, some seventy years after Slade's case, spoke of the action of Assumpsit as "much inferior and ignobler than the action of Debt," and characterized the rule that every contract executory implies a promise as "a false gloss, thereby to turn actions of Debt into actions on the case; for contracts of debt are reciprocal grants."†

Inasmuch as the simple contract debt had been created from time immemorial by a promise or agreement to pay a definite amount of money in exchange for a *quid pro quo*, the courts could not allow an action of Assumpsit also upon such a promise or agreement, without admitting that two legal relations, fundamentally distinct, might be produced by one and the same set of words. This implied a liberality of interpretation to which the lawyers of the sixteenth century

\* See Langdell, *Contracts*, § 100.

† *Edgeworth v. Der, Vaugh.* 89, 101. ["Si homme countast simplement d'un graunte d'un dette, il ne serra mye rescue sanz especialte." Per Sharshulle, J. Y. B. 11 & 12 Ed. III., 587.]

had not generally attained. To them it seemed more natural to consider that the force of the words of agreement was spent in creating the debt. Hence the necessity of a new promise, if the creditor desired to charge his debtor in Assumpsit.

As the actions of Assumpsit multiplied, however, it would naturally become more and more difficult to discriminate between promises to pay money and promises to do other things. The recognition of an agreement to pay money for a *quid pro quo* in its double aspect, that is, as being both a grant and a promise, and the consequent admissibility of Assumpsit, with its procedural advantages, as a concurrent remedy with Debt were inevitable. It was accordingly resolved by all the justices and barons in Slade's case, in 1603, although "there was no other promise or assumption but the said bargain," that "every contract executory imports in itself an *Assumpsit*, for when one agrees to pay money, or to deliver anything, thereby he assumes or promises to pay or deliver it; and, therefore, when one sells any goods to another, and agrees to deliver them at a day to come, and the other, in consideration thereof, agrees to pay so much money at such a day, in that case both parties may have an action of Debt, or an action on the case on *assumpsit*, for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case as well as actions of Debt." Inasmuch as the judges were giving a new interpretation to an old transaction; since they, in pursuance of the presumed intention of the parties, were working out a promise from words of agreement which had hitherto been conceived of as sounding only in grant, it was not unnatural that they should speak of the promise thus evolved as an "implied *assumpsit*." But the promise was in no sense a fiction. The fictitious *assumpsit*, by means of which the action of *Indebitatus Assumpsit* acquired its greatest expansion, was an innovation many years later than Slade's case.

The account just given of the development of *Indebitatus Assumpsit*, although novel, seems to find confirmation in the parallel development of the action of Covenant. Strange as it may seem, Covenant was not the normal remedy upon a covenant to pay a definite amount of money or chattels. Such a covenant being regarded as a grant of the money or chattels, Debt was the appropriate action for their recovery.\* The writer has discovered no case in which a plaintiff succeeded in an action of Covenant, where the claim was for a sum certain, antecedent to the seventeenth century; but in an action of Debt upon such a claim, in the Queen's Bench, in 1585, "it was holden by the Court that an action of Covenant lay upon it, as well as an action of Debt, at the election of the plaintiff."† The same right of election was conceded by the Court in two cases‡ in 1609, in terms which indicate that the privilege was of recent introduction. It does not appear in what court these cases were decided; but it seems probable that they were in the King's Bench, for, in *Chawner v. Bowes*,§ in the Common Bench, four years later, Warburton and Nichols, JJ., said: "If a man covenant to pay £10 at a day certain, an action of debt lieth for the money, and not an action of covenant." As late as 1628, in the same court, Berkeley, Serjeant, in answer to the objection that Covenant did not lie, but Debt, against a defendant who had covenanted to perform an agreement, and had obliged himself in a certain sum for its performance, admitted that, "if a covenant had been for £30, then debt only lies; but here it is to perform an agreement."|| Precisely when the Common Bench adopted

\* Anon. (1591), 1 Leon. 208. "Per curiam. If one covenant to pay me £100 at such a day, an action of debt lieth; *a fortiori* when the words of the deed are covenant and grant, for the word covenant sometimes sounds in covenant, sometimes in contract *secundum subjectam materiam*." † Anon., 3 Leon. 119.

‡ Anon., 1 Roll. Ab. 518, pl. 3; *Strong v. Watts*, 1 Roll. Ab. 518, pl. 2. See also *Mordant v. Watts*, Brownl. 19; Anon., Sty. 31; *Frere v. —*, Sty. 133; *Norrice's Case*, Hardl. 178.

§ Godb. 217.

|| *Brown v. Hancock*, Hetl. 110, 111.

the practice of the King's Bench it is, perhaps, impossible to discover; but the change was probably effected before the end of the reign of Charles I.

That Covenant became concurrent with Debt on a specialty so many years after Assumpsit was allowed as a substitute for Debt on a simple contract, was doubtless due to the fact that there was no wager of law in Debt on a sealed obligation.

Although the right to a trial by jury was the principal reason for a creditor's preference for *Indebitatus Assumpsit*, the new action very soon gave plaintiffs a privilege which must have contributed greatly to its popularity. In declaring in Debt, except possibly upon an account stated, the plaintiff was required to set forth his cause of action with great particularity. Thus, the count in Debt must state the quantity and description of goods sold, with the details of the price, all the particulars of a loan, the names of the persons to whom money was paid with the amounts of each payment, the names of the persons from whom money was received to the use of the plaintiff with the amounts of each receipt, the precise nature and amount of services rendered. In *Indebitatus Assumpsit*, on the other hand, the debt being laid as an inducement or conveyance to the *assumpsit*, it was not necessary to set forth all the details of the transaction from which it arose. It was enough to allege the general nature of the indebtedness, as for goods sold,\* money lent,† money paid at the defendant's request,‡ money had and received to the plaintiff's use,§ work and labour at the defendant's request,¶ or upon an account stated,¶¶ and that

\* *Hughes v. Rowbotham* (1592), 10oph. 30, 31; *Woodford v. Deacon* (1608), Cro. Jac. 206; *Gardiner v. Bellingham* (1612), 1Hob. 5, 1 Roll. R. 24, s. c.

† *Rooke v. Rooke* (1610), Cro. Jac. 245, Yelv. 175, s. c.

‡ *Rooke v. Rooke*, *supra*: *Moore v. Moore* (1611), 1 Bulst. 169.

§ *Babington v. Lambert* (1616), Moore, 854.

¶ *Russell v. Collins* (1669), 1 Sid. 425, 1 Mod. 8, 1 Vent. 44, 2 Kelt. 552, s. c.

¶¶ *Brinsley v. Partridge* (1611), Hob. 88; *Vale v. Egles* (1605), Yelv. 70, Cro. Jac. 69.



the defendant being so indebted promised to pay. This was the origin of the common counts.

In all the cases thus far considered there was a definite bargain or agreement between the plaintiff and defendant. But instances, of course, occurred in which the parties did not reduce their transactions to the form of a distinct bargain. Services would be rendered, for example, by a tailor or other workman, an innkeeper or common carrier, without any agreement as to the amount of compensation. Such cases present no difficulty at the present day, but for centuries there was no common-law action by which compensation could be recovered. Debt could not be maintained, for that action was always for the recovery of a liquidated amount.\* Assumpsit would not lie for want of a promise. There was confessedly no express promise; to raise by implication a promise to pay as much as the plaintiff reasonably deserved for his goods or services was to break with the most venerable traditions. The lawyer of to-day, familiar with the ethical character of the law as now administered, can hardly fail to be startled when he discovers how slowly the conception of a promise implied in fact, as the equivalent of an express promise, made its way in our law.

There seems to have been no recognition of the right to sue upon an implied *quantum meruit* before 1609. The innkeeper was the first to profit by the innovation. Reciprocity demanded that, if the law imposed a duty upon the innkeeper to receive and keep safely, it should also imply a promise on the part of the guest to pay what was reasonable.† The tailor was in the same case with the innkeeper, and his right

\* "If I bring cloth to a tailor to have a cloak made, if the price is not ascertained beforehand that I shall pay for the work, he shall not have an action against me." Y. B. 12 Ed. IV. 9, pl. 22, per Brian, C.J. To the same effect, *Young v. Ashburnham* (1587), 3 Leon. 161; *Mason v. Willand* (1688), Skin. 238, 242.

† "It is an implied promise of every part, that is, of the part of the innkeeper, that he will preserve the goods of his guest, and of the part of the guest, that he

to recover upon a *quantum meruit* was recognized in 1610.\* Sheppard,† citing a case of the year 1632, says: "If one bid me do work for him, and do not promise anything for it; in that case the law implieth the promise, and I may sue for the wages." But it was only four years before that the Court in a similar case were of opinion that an action lay if the party either before or after the services rendered promised to pay for them, "but not without a special promise."‡ In *Nichols v. More* § (1661) a common carrier resisted an action for negligence, because, no price for the carriage being agreed upon, he was without remedy against the bailor. The Court, however, answered that "the carrier may declare upon a *quantum meruit* like a tailor, and therefore shall be charged."|| As late as 1697, Powell, J., speaking of the sale of goods for so much as they were worth, thought it worth while to add: "And note the very taking up of the goods implies such a contract."¶

The right of one, who signed a bond as surety for another without insisting upon a counter bond or express promise to save harmless, to charge his principal upon an implied contract of indemnity, was developed nearly a century later. In *Bosden v. Thinne*\*\* (1603) the plaintiff at the defendant's request had executed a bond as surety for one P, and had been cast in a judgment thereon. The judges all agreed that upon the first request only Assumpsit did not lie, Yelverton, J., adding: "For a bare request does not imply any promise,

will pay all duties and charges which he caused in the house." *Warbrooke v. Griffin*, 2 Brownl. 254, Moore, 876, 877, s. c.

\* Six Carpenters' Case, 8 Rep. 147 a. But the statement that the tailor could recover in Debt is contradicted by precedent and following authorities.

† Actions on the Case (2 ed.), 50.

‡ *Thursby v. Warren*, W. Jones, 208.

§ 1 Sid, 36. See also *Boson v. Sundford* (1689), 1 Show. 101, per Eytes, J.

|| The defendant's objection was similar to the one raised in Y. B. 3 H. VI. 36, pl. 33, *supra*, p. 142, n.

¶ *Hayward v. Davenport*, Comb. 426.

\*\* Yelv. 40.

as if I say to a merchant, I pray trust J. S. with £100, and he does so, this is of his own head, and he shall not charge me, unless I say I will see you paid, or the like." The absence of any remedy at law was conceded in 1662.\* It was said by Buller, J., in *Toussaint v. Martinnant*,† that the first case in which a surety, who had paid the creditor, succeeded in an action at law against the principal for indemnity, was before Gould, J., ‡ at Dorchester, which was decided on equitable grounds." The innovation seems to be due, however, to Lord Mansfield, who ruled in favour of a surety in *Decker v. Pope*, in 1757, "observing that when a debtor desires another person to be bound with him or for him, and the surety is afterwards obliged to pay the debt, this is a sufficient consideration to raise a promise in law." §

The late development of the implied contract to pay *quantum meruit*, and to indemnify a surety, would be the more surprising, but for the fact that Equity gave relief to tailors and the like, and to sureties long before the common law helped them. Spence, although at a loss to account for the jurisdiction, mentions a suit brought in Chancery, in 1567, by a tailor, to recover the amount due for clothes furnished. The suit was referred to the queen's tailor, to ascertain the amount due, and upon his report a decree was made. The learned writer adds that "there were suits for wages and many others of like nature." || A surety who had no counter bond filed a bill against his principal, in 1632, in a case which would seem to have been one of the earliest of the kind, for the reporter, after stating that there was a decree for the plaintiff, adds, "*quod nota*." ¶

\* *Scott v. Stephenson*, 1 Lev. 71, 1 Sid. 89, S. C. But see Shepp. Act. on Case (2 ed.) 49. † 2 T. R. 100, 105.

‡ Justice of the Common Pleas, 1763-1794.

§ 1 Sel. N. P. (13 ed.) 91.

|| 1 Spence, Eq. Jur. 694. [*Daie v. Hampden* (1628), Toth. 174. Concerning salary for serving of a cure.]

¶ *Ford v. Shorbridge*, Nels. Ch. 24. || In 1613, in *Wormlington v. Evans*,

The account just given of the promise implied in fact seems to throw much light upon the doctrine of "executed consideration." One who had incurred a detriment at the request of another, by rendering service, or by becoming a surety with the reasonable expectation of compensation or indemnity, was as fully entitled, in point of justice, to enforce his claim at law, as one who had acted in a similar way upon the faith of an express promise. Nothing was wanting but an express *assumpsit* to make a perfect cause of action. If the defendant saw fit to make an express *assumpsit*, even after the detriment was incurred, the temptation to treat this as removing the technical objection to the plaintiff's claim at law might be expected to be, as it proved to be, irresistible.\* The already established practice of suing upon a promise to pay a precedent debt, made it the more easy to support an action upon a promise when the antecedent act of the plaintiff at the defendant's request did not create a strict debt.† To bring the new doctrine into harmony with the accepted theory of consideration, the promise was "coupled with" the prior request by the fiction of relation,‡ or, by a similar fiction, the consideration was brought forward or continued to the promise.§ This fiction doubtless enabled plaintiffs sometimes to recover, although the promise was not identical

Godb. 243, a surety was denied the right of contribution even in equity. The right was given, however, early in the reign of Charles I., *Fleet v. Charnock* (1630), Nels. 10, Toth. 41 s. c.; *Parkhurst v. Bulhurst* (1630), Toth. 41; *Wilcox v. Dunsmore* (1637), Toth. 41. The first intimation of a right to contribution at law is believed to be the *dictum* of Lord Kenyon, in *Turner v. Davies* (1796), 2 Esp. 479. The right to contribution at law was established in England by *Cowell v. Edwards* (1800), 2 B. & P. 268. But in North Carolina, in 1801, a surety failed because he proceeded at law instead of in equity, *Carvington v. Carson*, Cam. & Nor. Conf. R. 216.]

\* The view here suggested is in accordance with what has been called, in a questioning spirit, the "ingenious explanation" of Professor Langdell. Holmes, Common Law, 286. The general tenor of this paper will serve, it is hoped, to remove the doubts of the learned critic.

† *Sidenham v. Worlington* (1565), 2 Leon. 224.

‡ Langdell, *Contracts*, § 92.

§ Langdell, *Contracts*, § 92; 1 Vin. Ab. 280, pl. 13.

with what would be implied, and in some cases even where it would be impossible to imply any promise.\* But after the conception of a promise implied in fact was recognized and understood, these anomalies gradually disappeared, and the subsequent promise came to be regarded in its true light of cogent evidence of what the plaintiff deserved for what he had done at the defendant's request.

The non-existence of the promise implied in fact in early times, also makes intelligible a distinction in the law of lien, which greatly puzzled Lord Ellenborough and his colleagues. Williams, J., is reported to have said in 1605: "If I put my cloths to a tailor to make up, he may keep them till satisfaction for the making. But if I contract with a tailor that he shall have so much for the making of my apparel, he cannot keep them till satisfaction for the making."† In the one case, having no remedy by action, he was allowed a lien, to prevent intolerable hardship. In the other, as he had a right to sue on the express agreement, it was not thought necessary to give him the additional benefit of a lien.‡ As soon as the right to recover upon an implied *quantum meruit* was admitted, the reason for this distinction vanished. But the acquisition of a new remedy by action did not displace the old remedy by lien.§ The old rule, expressed, however, in the new form of a distinction between an express and an implied contract, survived to the present century.|| At

\* Langdell, *Contracts*, §§ 93, 94.

† 2 Roll. Ab. 92, pl. 1, 2.

‡ An innkeeper had the further right of selling a horse as soon as it had eaten its value, if there were no express contract. For, as he had no right of action for its keep, the horse hereafter was like a *damnosa hereditas*. The Hostler's case (1605), Yelv. 66, 67. This right of sale disappeared afterwards with the reason upon which it was founded. *Jones v. Parle*, 1 Stra. 556.

§ "And it was resolved that an innkeeper may detain a horse for his feeding, and yet he may have an action on the case for the meat." *Watbrook v. Griffith* (1609), Moore, 876, 877, 2 Brownl. 254 s. c.

|| *Chapman v. Allen*, Cro. Car. 271; *Collins v. Engly*, Selw. N. P. (13 ed.) 1312, n. (x), per Lord Holt; *Brennan v. Currint* (1755), Say. 224, Buller, N. P. (7 ed.) 45, n. (c); *Coxell v. Simpson*, 16 Ves. 275, 281, per Lord Eldon; *Scarfe v. Morgan*, 4 M. & W. 270, 283, per Parke, B.

length, in 1816, the judges of the King's Bench, unable to see any reason in the distinction, and unconscious of its origin, declared the old *dicta* erroneous, and allowed a miller his lien in the case of an express contract.\*

The career of the agistor's lien is also interesting. That such a lien existed before the days of implied contracts is intrinsically probable, and is also indicated by several of the books.† But in *Chapman v. Allen* ‡ (1632), the first reported decision involving the agistor's right of detainer, there happened to be an express contract, and the lien was accordingly disallowed. When a similar case arose two centuries later in *Jackson v. Cummins*,§ this precedent was deemed controlling, and, as the old distinction between express and implied contracts was no longer recognized, the agistor ceased to have a lien in any case. Thus was established the modern and artificial distinction in the law of lien between bailees for agistment and "bailees who spend their labour and skill in the improvement of the chattels" delivered to them.||

The value of the discovery of the implied promise in fact was exemplified further in the case of a parol submission to an award. If the arbitrators awarded the payment of a sum of money, the money was recoverable in debt, since an award, after the analogy of a judgment, created a debt. But if the award was for the performance of a collateral act, as, for example, the execution of a release, there was, originally, no mode of compelling compliance with the award, unless the parties expressly promised to abide by the decision of the arbitrators. *Tilford v. French* ¶ (1663) is a case in point. So,

\* *Chase v. Westmore*, 5 M. & Sel. 180.

† 2 Roll. Ab. 85, pl. 4 (1604); *Mackerney v. Firwin* (1628), Hutt. 101; *Chapman v. Allen* (1632), 2 Roll. Ab. 92, pl. 6, Cro. Car. 271, s. c. [See also Bro. Ab. Distresse, 67.]

‡ 2 Roll. Ab. 92, pl. 6, Cro. Car. 271, s. c.

§ 5 M. & W. 342.

|| The agistor has a lien by the Scotch law. Schouler, *Bailments* (2 ed.), § 122.

¶ 1 Lev. 113, 1 Sid. 160, 1 Keb. 599, 635. To the same effect, *Penruddock v.*

also, seven years later, "it was said by Twisden, J., that if two submit to an award, this contains not a reciprocal promise to perform ; but there must be an express promise to ground an action upon." \* This doctrine was abandoned by the time of Lord Holt, who, after referring to the ancient rule, said : " But the contrary has been held since ; for if two men submit to the award of a third person, they do also thereby promise expressly to abide by his determination, for agreeing to refer is a promise in itself." †

In the cases already considered the innovation of Assumpsit upon a promise implied in fact gave a remedy by action, where none existed before. In several other cases the action upon such a promise furnished not a new, but a concurrent remedy. Assumpsit, as we have seen, ‡ was allowed, in the time of Charles I., in competition with Detinue and Case against a bailee for custody. At a later period Lord Holt suggested that one might " turn an action against a common carrier into a special assumpsit (which the law implies) in respect of his hire." § *Dale v. Hall* || (1750) is understood to have been the first reported case in which that suggestion was followed. Assumpsit could also be brought against an innkeeper." ¶

Account was originally the sole form of action against a factor or bailiff. But in *Wilkins v. Wilkins* \*\* (1689) three of the judges favoured an action of Assumpsit against a factor because the action was brought upon an express promise, and *Monteagle* (1612) ; 1 Roll. Ab. 7, pl. 3 ; *Browne v. Downing* (1620), 2 Roll. R. 194 ; *Read v. Palmer* (1648), Al. 69, 70.

\* Anon, 1 Vent. 69.

† *Squire v. Grevell* (1703), 6 Mod. 34, 35. See similar statements by Lord Holt in *Allen v. Harris* (1695), 1 Ld. Ray. 122 ; *Freeman v. Barnard* (1696), 1 Ld. Ray. 248 ; *Purshov v. Baily* (1704), 2 Ld. Ray. 1039, 6 Mod. 221 s. c. ; *Lupart v. Wilson* (1708), 11 Mod. 171.

‡ *Supra*, p. 135.

§ Comb. 334.

|| 1 Wils. 281. See also *Bryton v. Dixon*, 1 T. R. 274, per Buller, J.

¶ *Morgan v. Ravy*, 6 H. & N. 265. But see *Stanley v. Bircher*, 78 Mo. 245.

\*\* 1 Show. 71 ; Carth. 89, 1 Salk. 9 ; Holt 6 s. c.

not upon a promise by implication. Lord Holt, however, in the same case, attached no importance to the distinction between an express and an implied promise, remarking that "there is no case where a man acts as bailiff, but he promises to render an account." \* The requisite of an express promise was heard of no more. Assumpsit became theoretically concurrent with Account against a bailiff or factor in all cases, although by reason of the competing jurisdiction of equity, actions at common law were rare.†

In the early cases of bills and notes the holders declared in an action on the case upon the custom of merchants. "Afterwards they came to declare upon an *assumpsit*." ‡

It remains to consider the development of *Indebitatus Assumpsit* as a remedy upon quasi-contracts, or, as they have been commonly called, contracts implied in law. The contract implied in fact, as we have seen, is a true contract. But the obligation created by law is no contract at all. Neither mutual assent nor consideration is essential to its validity. It is enforced regardless of the intention of the obligor. It resembles the true contract, however, in one important particular. The duty of the obligor is a positive one, that is, to act. In this respect they both differ from obligations, the breach of which constitutes a tort, where the duty is negative, that is, to forbear. Inasmuch as it has been customary to regard all obligations as arising either *ex contractu* or *ex delicto*, it is readily seen why obligations created by law should have been treated as contracts. These constructive duties are more aptly defined in the Roman law as obligations *quasi ex contractu* than by our ambiguous "implied contracts." §

Quasi-contracts are founded (1) upon a record, (2) upon a statutory, official, or customary duty, or (3) upon the

\* [But in *Spurraway v. Rogers* (1700), Lord Holt is reported as allowing assumpsit against a factor only upon his express promise.]

† *Tomkins v. Willshaer*, 5 Taunt. 430.

‡ *Milton's Case* (1668), Hard. 485, per Lord Hale.

§ In Finch, Law, 150, they are called "as it were" contracts.



fundamental principle of justice that no one ought unjustly to enrich himself at the expense of another.

As Assumpsit cannot be brought upon a record, the first class of quasi-contracts need not be considered here. Many of the statutory, official, or customary duties, also, *e.g.* the duty of the innkeeper to entertain,\* of the carrier to carry,† of the smith to shoe,‡ of the chaplain to read prayers, of the rector to keep the rectory in repair,§ of the *fidei-commis*s to maintain the estate,|| of the finder to keep with care,¶ of the sheriff and other officers to perform the functions of their office,\*\* of the shipowner to keep medicines on his ship,†† and the like, which are enforced by an action on the case, are beyond the scope of this essay, since *Indebitatus Assumpsit* lies only where the duty is to pay money [or a definite amount of chattels]. For the same reason we are not concerned here with a large class of duties growing out of the principle of unjust enrichment, namely, constructive or quasi trusts, which are enforced, of course, only in equity.

Debt was originally the remedy for the enforcement of a statutory or customary duty for the payment of money. The right to sue in *Indebitatus Assumpsit* was gained only after a struggle. The *assumpsit* in such cases was a pure fiction. These cases were not, therefore, within the principle of *Slade's case*, which required, as we have seen,‡‡ a genuine agreement. The authorities leave no room for doubt upon this point, although it is a common opinion that, from the time of that case, *Indebitatus Assumpsit* was concurrent with

\* Keil. 50, pl. 4.

† *Jackson v. Rogers*, 2 Show. 327; Anon., 12 Mod. 3.

‡ *Stinson v. Heath*, 3 Lev. 400.

§ *Bryan v. Clay*, 1 E. & B. 38.

|| *Bathkany v. Walford*, 36 Ch. Div. 269.

¶ Story, *Bailments* (8 ed.), §§ 85-87.

\*\* 3 Hl. Com. 165.

†† *Couch v. Steel*, 3 E. & B. 402. But see *Atkinson v. Newcastle Co.* 2 Ex. Div. 441.

‡‡ *Supra*, p. 291.

Debt in all cases, unless the debt was due by record, specialty, or for rent.

The earliest reported case of *Indebitatus Assumpsit* upon a customary duty seems to be *City of London v. Goree*,\* decided seventy years later than Slade's case. "Assumpsit for money due by custom for scavage. Upon *non-Assumpsit* the jury found the duty to be due, but that no promise was expressly made. And whether Assumpsit lies for this money thus due by custom, without express promise, was the question. Resolved it does." On the authority of that case, an officer of a corporation was charged in Assumpsit, three years later, for money forfeited under a by-law.† So, also, in 1688, a copyholder was held liable in this form of action for a customary fine due on the death of the lord, although it was objected "that no *Indebitatus Assumpsit* lieth where the cause of action is grounded on a custom."‡ Lord Holt had not regarded these extensions of *Indebitatus Assumpsit* with favour.§ Accordingly, in *York v. Toun*,|| when the defendant urged that such an action would not lie for a fine imposed for not holding the office of sheriff, "for how can there be any privity of assent implied when a fine is imposed on a man against his will?" the learned judge replied: "We will consider very well of this matter; it is time to have these actions redressed. It is hard that customs, by-laws, rights to impose fines, charters, and everything, should be left to a jury." By another report of the same case,¶ "Holt seemed

\* 2 Lev. 174, 1 Vent. 298, 3 Keb. 677, Freem. 433, S. C.

† *Barber Surgeons v. Pelson* (1676), 2 Lev. 252. To the same effect, *Mayor v. Hunt* (1681), 2 Lev. 37, Assumpsit for weighage; *Duppa v. Gerard* (1688), 1 Show. 78, Assumpsit for fees of knighthood. [*Tobacco Co. v. Loder*, 16 Q. B. 765.]

‡ *Shuttleworth v. Garrett*, Comb. 151, 1 Show. 35, Carth. 90, 3 Mod. 240, 3 Lev. 261, S. C.

§ [In *Smith v. Airey*, 6 Mod. 128, 129, he said: "An *indebitatus* has been brought for a tenant right fine, which I could never digest." See also Anon. Farrelly, 12.]

|| 5 Mod. 444.

¶ 1 Ld. Ray. 502.

o incline for the defendant. . . . And upon motion of the plaintiff's counsel, that it might stay till the next term, Holt, C.J., said that it should stay till dooms-day with all his heart; but Rokesby, J., seemed to be of opinion that the action would lie.—*Et adjournatur*. Note. A day or two after I met the Lord Chief Justice Treby visiting the Lord Chief Justice Holt at his house, and Holt repeated the said case to him, as a new attempt to extend the *Indebitatus Assumpsit*, which had been too much encouraged already, and Treby, C.J., seemed also to be of the same opinion with Holt." But Rokesby's opinion finally prevailed. The new action continued to be encouraged. Assumpsit was allowed upon a foreign judgment in 1705,\* and the "metaphysical notion"† of a promise implied in law became fixed in our law.

The equitable principle which lies at the foundation of the great bulk of quasi-contracts, namely, that one person shall not unjustly enrich himself at the expense of another, has established itself very gradually in the Common Law. Indeed, one seeks in vain to-day in the treatises upon the Law of Contract for an adequate account of the nature, importance, and numerous applications of this principle.‡

The most fruitful manifestations of this doctrine in the early law are to be found in the action of Account. One who received money from another to be applied in a particular way was bound to give an account of his stewardship. If he fulfilled his commission, a plea to that effect would be a valid discharge. If he failed for any reason to apply the money in the mode directed, the auditors would find that the amount received was due to the plaintiff, who would have a judgment for its recovery. If, for example, the money was to be applied

\* *Duplex v. De Rover*, 2 Vern. 540.

† *Starke v. Cheeseman*, 1 Ld. Ray. 538.

‡ The readers of this Review will be interested to learn that this gap in our legal literature is about to be filled by Professor Keener's *Cases on the Law of Quasi-Contracts*. [Professor Keener published his *Cases in Quasi-Contracts* in 1888, and followed it, in 1893, with his admirable treatise on the same subject.]

in payment of a debt erroneously supposed to be due from the plaintiff to the defendant, either because of a mutual mistake, or because of fraudulent representations of the defendant, the intended application of the money being impossible, the plaintiff would recover the money in Account.\* Debt would also lie in such cases, since, at an early period, Debt became concurrent with Account, when the object of the action was to recover the precise amount received by the defendant.† By means of the fiction of a promise implied in law, *Indebitatus Assumpsit* became concurrent with Debt, and thus was established the familiar action of Assumpsit for money had and received to recover money paid to the defendant by mistake. *Bonnel v. Foruke* ‡ (1657) is, perhaps, the first action of the kind.§

Although Assumpsit for money had and received was in its infancy merely a substitute for Account, it gradually outgrew the limits of that action. Thus, if one was induced by fraudulent representations to buy property, the purchase-money could not be recovered from the fraudulent vendor by the action of Account. For a time, also, *Indebitatus Assumpsit* would not lie in such a case. Lord Holt said, in 1696: "But where there is a bargain, though a corrupt one, or where one sells goods that were not his own, I will never allow an *indebitatus*." || His successors, however, allowed the action. Similarly, Account was not admissible for the recovery of money paid for a promise which the defendant

\* *Hewer v. Bartholomew* (1597), Cro. El. 614; *Anon.* (1696), Comb. 447; *Cavendish v. Middleton*, Clo. Car. 141, W. Jones, 196, s. c.

† *Lincoln v. Tophill* (1597), Cro. El. 644.

‡ 2 Sid. 4. To the same effect, *Martin v. Sitwell* (1690), 1 Show. 156, Holt, 25; *Newdigate v. Dary* (1692), 1 Ld. Ray. 742; *Palmer v. Slaveley* (1700), 12 Mod. 510.

§ [In *Mad v. Death* (1700), 1 Ld. Ray. 742, however, one who paid money under a judgment was not allowed to recover it, although the judgment was afterwards reversed. The rule to-day is, of course, otherwise. Keener, *Quasi-Contracts*, 417.]

|| *Anon.*, Comb. 447.

refused to perform. Here, too, Debt and *Indebitatus Assumpsit* did not at once transcend the bounds of the parent action.\* But in 1704 Lord Holt reluctantly declined to nonsuit a plaintiff who had in such a case declared in *Indebitatus Assumpsit*.† Again, Account could not be brought for money acquired by a tort, for example, by a disseisin and collection of rents or a conversion and sale of a chattel.‡ It was decided, accordingly, in *Philips v. Thompson* § (1675), that Assumpsit would not lie for the proceeds of a conversion. But in the following year the usurper of an office was charged in Assumpsit for the profits of the office, no objection being taken to the form of action.|| Objection was made in a similar case in 1677, that there was no privity and no contract; but the Court, in disregard of all the precedents of Account, answered: "An *Indebitatus Assumpsit* will lie for rent received by one who pretends a title; for in such cases an Account will lie. Wherever the plaintiff may have an Account an *indebitatus* will lie."¶ These precedents were deemed conclusive in *Howard v. Wood*\*\* (1678), but Lord Scroggs remarked: "If this were now an original case, we are agreed it would by no means lie." Assumpsit soon became concurrent with Trover, where the goods had been sold.†† Finally, under the influence of Lord Mansfield, the action was so much encouraged that it became almost the

\* Brig's Case (1623), Palm. 364; *Newbery v. Chapman* (1695), Holt. 35; Anon. (1696), Comb. 447.

† *Holmes v. Hall*, 6 Mod. 161, Holt, 36, s. c. See also *Dutch v. Warren* (1720), 1 Stra. 406, 2 Burr. 1010, s. c.; Anon., 1 Stra. 407.

‡ *Tottenham v. Beddingfield* (1572), Dal. 99, 3 Leon. 24, Ow., 35, 83, s. c. Accordingly, an account of the profits of a tort cannot be obtained in equity 10-day except as an incident to an injunction.

§ 3 Lev. 191.

|| *Woodward v. Aston*, 2 Mod. 95.

¶ *Arris v. Stukeley*, 2 Mod. 260.

\*\* 2 Show. 23, 2 Lev. 245, Freem. 473, 478, T. Jones, 126, s. c.

†† *Jacob v. Allen* (1703), 1 Salk. 27; *Lamine v. Dorrell* (1705), 2 Ld. Ray. 4216. *Phillips v. Thompson*, *supra*, was overruled in *Hitchins v. Campbell*, 2 W. Bl. 827.

universal remedy where a defendant had received money which he was "obliged by the ties of natural justice and equity to refund." \*

But one is often bound by those same ties of justice and equity to pay for an unjust enrichment enjoyed at the expense of another, although no money has been received. The quasi-contractual liability to make restitution is the same in reason, whether, for example, one who has converted another's goods turns them into money or consumes them. Nor is any distinction drawn, in general, between the two cases. In both of them the claim for the amount of the unjust enrichment would be provable in the bankruptcy of the wrong-doer as an equitable debt,† and would survive against his representative.‡ Nevertheless, the value of the goods consumed was never recoverable in *Indebitatus Assumpsit*. There was a certain plausibility in the fiction by which money acquired as the fruit of misconduct was treated as money received to the use of the party wronged. But the difference between a sale and a tort was too radical to permit the use of Assumpsit for goods sold and delivered where the defendant had wrongfully consumed the plaintiff's chattels.§

The same difficulty was not felt in regard to the quasi-contractual claim for the value of services rendered. The averment, in the count in Assumpsit, of an indebtedness for work and labour was proved, even though the work was done by the plaintiff or his servants under the compulsion of the defendant. Accordingly, a defendant who enticed away the plaintiff's apprentice and employed him as a mariner, was charged in this form of action for the value of the apprentice's services.||

\* *Moses v. MacFerlan* 2 Burr. 1005, 1012.

† *Ex. p. Adams*, 8 Ch. Div. 807, 819.

‡ *Phillips v. Homfray*, 24 Ch. Div. 439.

§ [This statement is too sweeping. The authorities are divided on the question. See Keener, *Quasi-Contracts*, 192-195].

|| *Lightly v. Clouston*, 1 Taunt. 112. See also *Gray v. Hill*, Ry. & M. 420.

By similar reasoning, Assumpsit for use and occupation would be admissible for the benefit received from a wrongful occupation of the plaintiff's land. But this count, for special reasons connected with the nature of rent, was not allowed upon a quasi-contract.\*

In Assumpsit for money paid the plaintiff must make out a payment at the defendant's request. This circumstance prevented for a long time the use of this count in the case of quasi-contracts. Towards the end of the last century, however, the difficulty was overcome by the convenient fiction that the law would imply a request whenever the plaintiff paid, under legal compulsion, what the defendant was legally compellable to pay.†

The main outlines of the history of Assumpsit have now been indicated. In its origin an action of tort, it was soon transformed into an action of contract, becoming afterwards a remedy where there was neither tort nor contract. Based at first only upon an express promise, it was afterwards supported upon an implied promise, and even upon a fictitious promise. Introduced as a special manifestation of the action on the case, it soon acquired the dignity of a distinct form of action, which superseded Debt, became concurrent with Account, with Case upon a bailment, a warranty, and bills of exchange, and competed with Equity in the case of the essentially equitable quasi-contracts growing out of the principle of unjust enrichment. Surely it would be hard to find a better illustration of the flexibility and power of self-development of the Common Law.

JAMES BARR AMES.

\* But see *Mayor v. Sanders*, 3 B. & Ad. 411.

† *Turner v. Davis* (1796), 2 Esp. 476; *Cowell v. Edwards* (1800), 2 B. & P. 268; *Craythorne v. Swinburn* (1807), 14 Ves. 160, 164; *Exall v. Partridge* (1799), 8 T. R. 308.

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## V.—OBITUARY: THE RIGHT HONOURABLE LORD LUDLOW.

“**L**UDLOW of Heywood” is, stated fully and accurately, the title bestowed upon the late Lord Justice Lopes on the occasion of his elevation to the Peerage, when the Queen’s Diamond Jubilee was celebrated in 1897, and shortly before his retirement from the Judicial Bench.

The word “Ludlow” would alone happily unite, in a single word, alike the name of a place, which appears to be an indispensable requisite to the name of every Peerage, and the family name, which is an element in the title of many of the modern Peerages which have been bestowed upon lawyers, such as “Russell of Killowen,” or “James of Hereford” and so on.

The late Lord Justice Lopes, the founder of the title, was, on his father’s side, a scion of the wealthy Devonshire house of “Lopez.” But he derived alike the title of his Barony, and much of his property, from his mother, who was a Ludlow of Heywood, Wiltshire.

We, in Devon, make proud note of the successes of all those who are of the lineage of our leading families, whether their ancestors “came over with the Conqueror” or became inhabitants of the county within recorded memory. Accordingly, every Devonshire man, so soon as one of his fellow-countrymen attains fame of any sort, can usually at once tell you all about him and his fathers, and this, whether the celebrity be himself merely a quiet country parson, whose famous breed of game cocks has won him prizes at the county poultry shows, but whose ancestors were found here by the Conqueror when he came over; or be even a Lord Chancellor himself, known as a sound Churchman, but who had ancestors who, some three hundred years ago, gave the Quarter Sessions much trouble by their persistency in



continually appearing as "Popish recusants"; or, as in the present case, merely a judge, and the founder of a Peerage, whose family first settled in the county but a century ago!

The name of "Lopes," or "Lopez," as it was formerly spelt, denotes an Oriental origin. For many generations, however, branches of the family would seem to have been settled in England since the name, though rare, has long been not wholly unfamiliar to the English Law. As far back as A.D. 1603, we find another form of it in the name of one of the parties to the famous case of *Chandelor v. Lopus*, immortalised in the memory of English lawyers in connection with the transaction with a "Bezoar stone," with the details of which they have long been familiar.

In the very year on which the first of the Stuarts began his reign the King's Courts tried an action for deceit brought by a Mr. Chandelor against a Mr. Lopus. Mr. Lopus, it will be recollected, had sold to Mr. Chandelor something which he "affirmed" to be "a Bezoar stone," a substance much prized in India as a charm against snake-bites. As, however, no one at that time knew exactly what a Bezoar stone was—indeed, it is doubtful whether the real article is a stone at all, since the "Bezoar stone" then was amongst precious stones like the unicorn amongst animals—an undiscovered mystery—Mr. Lopus' counsel had, doubtless, no trouble in persuading the jury that, when his client sold the thing, he really did not know whether it was a "bezoar" stone or not; while the Court were clear that, as matter of Law, no action would lie for a "deceit" which was not wilful and intentional. But, whatever the legal value of the case nowadays, we at least learn from it, in connection with the teaching of the Law, the earlier form of the name of Lopes, and get grounds for supposing that the Lopez family is at least as old in England as the Stuarts.

The founder of the Devonshire family of Lopes was the late Lord Justice's paternal great-uncle, and named Manasseh

Lopez. During the first few years of the present century, there appeared in Devonshire an energetic and successful man of business, then aged about forty-five years, who had been born in Jamaica in 1755, of a father who had come to that island from Clapham. We thus have unmistakable evidence of this branch of the Lopes family having been settled in England at least one hundred and fifty years ago, even if the connection with Mr. Lopus of James the First's days be not considered to be sufficiently clear. The new-comer purchased the pleasant country seat and estates of Maristow, near Plymouth, just under Roborough Down,\* where his family have been settled ever since. Successful in business, he determined to be equally successful in social and political life. The road to success in both directions, after an aspirant had acquired an important landed estate, lay—to be brutally frank—through a generous expenditure in the rotten boroughs whose representatives in Parliament, in those days, governed the country, with the aid of their patrons in the House of Lords. England, at that time, swarmed with rich men—the “Nabob's” as they were called—who, having amassed large fortunes in the East, had returned to their native country to expend them in the acquisition of weight and importance alike in social and political life. In the previous century, the notorious Governor Pitt, of great diamond memory, had, by the transaction with the poor negro, which forms the subject of Cowper's well-known lines, derived a fortune, and had, with the fortune thus acquired, bought up sundry rotten borough constituencies. By the purchase of one of them (that of the borough of old Sarum), he had brought it about that the elder William Pitt should, when only a subaltern in the Blues, enter Parliament, become known among his contemporaries as “that terrible Cornet of Horse,” acquire power in the land, and should, while himself becoming Earl

\* In Devon, the scarlet briony is called “the ro-berry,” and this plant is abundant in a small entrenchment on this Down.

of Chatham, render it comparatively easy for a man possessed of the great ability, which the younger Pitt unquestionably enjoyed, to become Prime Minister of England at an age when most men commence their professional careers at the Bar or in the Church.

Manasseh Lopez was probably not slow to observe the brilliant example just mentioned, as well as others which may have come under his notice. He, too, followed the fashion of the day, and, like his contemporaries, took his part in that traffic in rotten boroughs which then formed the staple of political life. Doubtless after taking a proper interest in its local politicians, he was, in 1802, returned as M.P. for the borough of New Romney. Being a man of enormous wealth, and possessed of a fortune, which, on his death (in 1831), was estimated at the princely sum of eight hundred thousand pounds, he, during his first Parliament (viz. in 1805), had a baronetcy bestowed upon him. And being childless himself, he procured this baronetage to be granted with a "special remainder" to his nephew. This nephew was the son of his late sister Esther, by one Abraham Franco, a young man, who having been adopted by his maternal uncle, had become known as Ralph Lopez. Sir Manasseh, in the same year, obtained a royal licence to use the family name of "Massey," in addition to and before his own surname of Lopez, and the family still employ it.

Though he had thus quickly obtained his baronetcy, Sir Manasseh Massey Lopez did not, as is the manner of so many, at once retire from public life. For, in 1812, and again in 1818, he was returned to Parliament again as M.P. for Barnstaple—a borough never notorious for its purity. Corrupted, it may be, by long acquaintance with the fishermen freemen of this ancient borough, encouraged by the immunity which, as noted by Hallam, they had for centuries enjoyed, and possibly also with an eye to obtaining that peerage which in later years his great nephew so honourably earned, Sir Manasseh,

it is grievous to relate, obtained a seat in the next Parliament by dealings with the freemen of Grampound, which were in flagrant violation of the law as it then stood, and repugnant to the political morality of the day. At that time, patrons might sell boroughs, and that too for large sums, and aspiring and ambitious men might buy them at corresponding prices. Indeed, it had been recognized by the younger Pitt, during his abortive efforts to pass a Reform Bill, and even by Parliament itself in the Act of Union with Ireland, that the franchise of boroughs was the private property of those who owned them, and that any disenfranchisement of them was a proper subject for liberal "compensation." But any direct dealing between the voters for a borough and a candidate who aspired to represent the "free and independent" body of the electors, was an illegal trafficking with votes, and punishable with the utmost rigour of the law. In short, political representation in those days apparently stood in much the same position as the right to present to an ecclesiastical benefice still occupies. Just as it is hideous "Simony" for an aspirant to the one to buy the next presentation for himself, so was it then illegal for the candidate for a borough to have direct money dealings with the electors. Sir Manasseh, however, dared to directly approach the freeholders of the borough of Grampound, who were at that time some sixty in number, and possessed by no owner of their borough, and to bargain with them to pay a sum of two thousand pounds which, when equally divided among them, gave each a sum of nearly thirty-five pounds, or possibly, after allowance for disappearances from the register by death and otherwise, a little more than that sum. The offence thus committed was as bad a one as that of which a candidate is guilty in these more moral days, if he distribute among the electors cards which can, by any ingenuity, be used as "cockades," instead of deluging his would-be constituency with coals and blankets through regularly organized channels, and under the name of "charity."

*In both cases the forfeiture of the seat is involved. Sir Manasseh, by his action thus taken in careless disregard of the strict letter of the law, not only forfeited his seat, but also exposed himself to severe personal punishment. As Macaulay observes\* : "Once in every six or seven years our virtue becomes outrageous . . . we must teach libertines . . . and accordingly some unfortunate man, in no respect more depraved than hundreds whose offences have been treated with lenity, is singled out as an expiatory sacrifice . . . he is in truth made a sort of whipping-boy, by whose vicarious agonies all the other transgressors of the same class are, as it is supposed, sufficiently chastised."* That this should be done only fulfils the words of the same writer,† "Each age and every nation has certain characteristic vices, which prevail almost universally, which scarcely any person scruples to avow, and which even rigid moralists but faintly censure," while "succeeding generations change the fashion of their morals with the fashion of their hats and their coaches ; take some other kind of wickedness under their patronage, wonder at the depravity of their ancestors . . . and finding the delinquents too numerous to be all punished, select some of them at hazard to bear the whole penalty, of an offence in which they are not more deeply implicated than others who escape." Accordingly, it was demanded that the majesty of the law, as it then existed, should be vindicated, and that the serious technical breach of it, of which Sir Manasseh had been guilty, should be severely punished, and men taught that when wrong is done, it must always be committed according to law. So poor Sir Manasseh, though probably "in no respect more depraved than scores of his fellows, whose offences were treated with lenity," was singled out as the exemplary sacrifice, and "made a whipping-boy."

\* Essay on Byron. *Macaulay's Works*, vol. ii. 389, 390, of 1866, Library edition.

† *Macaulay's Works*, *ubi sup.*, at p. 64, in Essay on Machiavelli.

The *Gentleman's Magazine* \* and the *Annual Register* † record how Sir Manasseh was tried for bribery at Exeter, before Mr. Justice Holroyd, at the Assizes there in March, 1819; was convicted in spite of the "stock defence" of "charitable motives," which is usual in such cases, being vehemently asserted by his counsel; and was, in the following November, sentenced by the Court of King's Bench, which doubtless at that time faithfully reflected outraged public feeling, to pay a fine of £8000, and endure imprisonment in Exeter gaol for twenty-one months, as punishment on the first count of the indictment, and to pay a fine of £2000 and endure three more months' imprisonment, on the second count of the indictment—in short, was subjected to the monstrous punishment of a fine of £10,000 and two years' imprisonment!

The Baronet paid his fine and "did his time" like a man. At the end of his term of imprisonment he, with great ingenuity, sarcastically conveyed his contempt for the imprisonment which he had been forced to undergo. Having been discharged from Exeter gaol at mid-day, he found the coach by which he could go back to Maristow had left an hour previously, upon which he returned to the gaol, and successfully insisted on being lodged there yet another night at the public expense, thus implying that, wealthy as he was, the importance of the cost of a night's lodging was of more importance in his eyes than the supposed degradation of having to lodge in a gaol.

A conviction for bribery at an election did not, in those days, entail subsequent disfranchisement, disqualification for holding public offices, or even disability to be again immediately returned to Parliament. Sir Manasseh Lopez remained in his office of Recorder of Westbury—a position which many of his family have since also filled. Taught by his Grampound

\* Vol. 101, Part I. (May, 1831), at p. 645.

† Vol. 73 (for 1831), at p. 232.

experiences he, between two and three years after he had undergone his imprisonment, purchased the snug Borough of Westbury for £6500 from the Earl of Abingdon (in 1823)—a purchase which was doubtless duly effected strictly according to law. In the year in which this purchase was made,\* and again in 1826, he was accordingly returned as M.P. for that Borough. Doubtless he would also have been returned again in 1829. But the year 1829 will be remembered to have been one during which the country was greatly agitated on the question of Catholic Emancipation. At the election in that year, Peel met the same misfortune as that which, in our own days, befell his follower and pupil William Ewart Gladstone. Each had been M.P. for the University of Oxford, and each abruptly changed his mind on the burning political question of the hour. Peel suddenly declared in favour of Catholic Emancipation, just as Gladstone in later days announced a determination to dis-establish the Irish Church. The University in each case ejected the renegade. Sir Manasseh Lopez must then be credited with an act at once patriotic and unselfish—for he gave up his safe seat at Westbury in order that a place in the House of Commons might be found for Peel. This sacrifice was the more unselfish, because he himself must have repeatedly, as an M.P., taken the Parliamentary Oath, which, until the Catholic Emancipation Act, excluded all Roman Catholics from the House of Commons, and shut out Jews also, till the efforts of Sir David Saloman procured its repeal.

Sir Manasseh Lopes' position as Recorder of Westbury and M.P. for that Borough, doubtless caused an intimacy to arise between his family and that of Mr. Ludlow, the then owner of Heywood. This culminated in the marriage of the nephew

\* Some say that this purchase took place as early as 1810. But it certainly did not take effect then, or Sir Manasseh, possessed of a cosy pocket Borough of his own, would hardly have sought a seat in subsequent years from Barnstaple and from Grampound.

and heir of the wealthy Baronet with one of the two daughters of the owner of Heywood—the other daughter also marrying into a well-known Devonshire family, now itself connected by marriage with the Lopes family—that of the Yarde-Bullers—with which it is very probable that the Ludlows had grown to be acquainted through the Lopes' friendship.

The "Whipping-Boy" Baronet was in due course succeeded (in 1831) by his nephew Sir Ralph, in accordance with the special remainder contained in the patent creating the Baronetcy. Sir Ralph (the second Baronet) was the father of the late Lord Justice, by the marriage just mentioned between him and Susan Gibbs, the daughter of the late Mr. A. Ludlow, of Heywood.

The Ludlows are an old Wiltshire family, though the name (for it will be recollected that English surnames are largely derived from the place of origin of the family) seems to indicate that they sprang from the County of Hereford. One of the members of this family was M.P. for Wiltshire as early as the time of the Civil War. His son was the well-known (General or Colonel) Edmund Ludlow, of whom Macaulay writes, that "he had, when an ardent enthusiast of twenty-eight, taken part in the trial of Charles the First;" that as years rolled by he had "been left almost the only survivor, and certainly the most illustrious survivor of a mighty race of men, the conquerors in a terrible civil war, the judges of a king, and the founders of a Republic,"\* and that when, forty years afterwards, the enemies of the House of Stuart appealed to him to help them against James II., "the stern old regicide refused . . . his work he said was done; if England were still to be saved, she must be saved by younger men."† We learn from the same source that the house at Vevay, on the Lake of Geneva, where this famous Ludlow died, is still venerated by the family,

\* See *Macaulay's History of England*, vol. i. pp. 200, 201, of 1826 Library Edition.

† Macaulay, *ubi sup.*, vol. i. p. 145.



and that English travellers are still taken to see it, "though the inscription, *omne solum forti patria, quia patris*, once inscribed upon it was no longer visible there, even in Macaulay's time." \*

Such then, to use an expressive old Devonshire phrase, was the "haveage" of the future Lord Justice.

The marriage of Sir Ralph, the second baronet of the house of Lopes, and nephew of its founder, with Miss Ludlow, was followed by the birth of what is locally called "a long family." The eldest of this family, the present Sir Massey Lopes, is now the owner of Maristow, and is a well-known public man, who has borne office in some recent Conservative Administrations. Of the second son, Ralph Ludlow Lopes, it will be necessary to incidentally say more hereafter. Henry Charles Lopes, the third son, was, as we shall see subsequently, a Judge of the Queen's Bench, afterwards a Lord Justice of Appeal, and, as already stated, became the founder of the Ludlow Peerage.

The subject of our Memoir was born at Devonport, on October 3, 1828. In due course he was, like many a west country lad of good family, sent to the school of William of Wykeham, at Winchester. Probably it was to the school whose quaint motto is "Manners makyth man," that the future judge owed that easy manner and pleasant address, which was afterwards characteristic of him on the Bench. At about the usual age, Henry Charles Lopes proceeded to Balliol College, Oxford, where he took his B.A. degree in the year 1850. Having entered as a student at the Inner Temple while at Oxford, he, two years later (*viz.* in 1852), was called to the Bar by the Inn of Court just named. During the five years which followed, he practised as a member of the Equity Bar, having chambers at 23, Old Square, Lincoln's Inn.

\* Macaulay translates the motto as meaning that "to him to whom God is a Father, every land is a fatherland." Macaulay, *ubi sup.*, vol. iii, pp. 199, 200.

Among other west country lads who were educated at Winchester school as well as young Lopes, there was one Henry Clarke, the eldest son of the owner of the Manor of Efford, near Plymouth, which lay closely adjacent to Maristow. Mr. Henry Clarke, in later years, became a barrister himself, went the Western Circuit, and was Recorder of Tiverton until quite recently. It is not difficult to suppose that an increased intimacy was created between the families at Maristow and at Efford, from each having a son at Winchester school. However this may have been, Mr. Lopes, in 1854, and while still practising at the Chancery Bar, was married to Miss Cordelia Lucy Clarke, the eldest daughter of the Squire of Efford, and the sister of the Henry Clarke just mentioned. The marriage took place at the parish church of Egg Buckland, a village which is also near Plymouth. With characteristic prudence, the bridegroom, after the fashion of many rising members of the Bar, arranged that no undue waste of professional time should arise in consequence of his marriage, which accordingly took place during the long vacation.

Within a few years good fortune came to the bridegroom, and remained constant to him during the rest of his life. In 1857, or only three years after his marriage, Ralph Ludlow Lopes, his brother, was placed by the death of a near relative in possession of Sandridge Park, near Melksham, and thus caused to permanently withdraw from the Common Law Bar (at which he had acquired a considerable practice), and to take up his residence at Sandridge Park (where he died only a few years ago). Mr. Henry Lopes was not slow in seizing the advantage thus offered to him. From this time, he by degrees left the Equity Bar, diligently attended sessions and assizes, and took up the Common Law practice, with its large local and family connections, from which his brother Ralph had retired under such pleasant circumstances. For some years, indeed, his old address in Lincoln's Inn appears after his name in the Law List. His transition from

the Equity Bar to the Common Law one was, of course, gradual. Although he had occupied them for some time previously, he figures, for the first time, in the Law List for 1862, as having chambers in the Temple, at 1, Elm Court. These he shared with Mr. John Digby, by whom they are still occupied. In the following year (1863) he and the late Mr. H. T. Cole, Q.C. (who had till then been in Brick Court), united together in taking the chambers in Goldsmith Building, Temple, subsequently, and still, held by Sir Arthur Collins, another member of the Western Circuit, and, till quite recently, Chief Justice of Madras.

Mr. H. C. Lopes, as a son of an influential county family in Devonshire, connected with Wiltshire through his mother's family, the Ludlows, himself a "man of parts," and already a barrister of considerable standing and experience, had not to wait long before acquiring business on circuit. While the bulk of his business was at first naturally at sessions, he quickly acquired considerable practice at assizes, and his work rapidly grew to be almost exclusively of a Common Law and circuit nature. This it was that led to his "emigration" from Lincoln's Inn to the Temple, as has been already noticed. The present writer's first recollection of Mr. Lopes was while the latter was still a junior, and while he was himself serving as an articled clerk to his uncle, the late Mr. John Daw, then a well-known solicitor in the West of England, practising at Exeter. Mr. Daw, who possessed a high-class commercial and conveyancing business, rarely engaged in Common Law cases, and still less frequently in criminal ones. When, however, he undertook either the one or the other, he usually did so in the interests of some important client, and always threw himself into the case with characteristic energy and zeal. Having undertaken a small and comparatively unimportant, though intricate, prosecution of a clerk, against whom a charge of embezzlement had been brought by a wealthy commercial man, which stood for trial

at the then approaching assizes, Mr. Daw had retained the rising sessions junior, Mr. H. C. Lopes, to conduct the prosecution. Anxious that there should be no slip in the case, he, without any notice to the counsel he had retained, betook himself to the old Guildhall at Exeter, during the Midsummer quarter sessions, to get a few words with him. The learned counsel naturally received an important local solicitor with all that courtesy and urbanity of which he was a master. He confessed, however, that he had (not unnaturally) left the papers in the case at his lodgings in Castle Street, in the upper part of the town, and close to the Castle, where the county sessions would be held next day. Catching sight of the writer, Mr. Lopes inquired who he was, and learning that he was the client's nephew and articulated clerk, remarked that he could not trust every one amongst his papers, but that he was sure he might trust Mr. Daw's nephew and pupil, and asked the then modest and abashed law student whether he thought he could go to his rooms, pick out the required papers, and bring them to him at the Guildhall. This mission was, of course, undertaken. The messenger, then a very young and inexperienced youth, was tremendously impressed alike by this display of confidence in him, and by the very large number of papers amongst which he had to make search before finding those which were required at Exeter Guildhall. The incident afforded an introduction to Mr. Lopes, which the latter did not forget in after years when his messenger became himself a member of the Western Circuit.

A few years after this occurrence, and within the comparatively short period of about ten years after his joining the Common Law Bar, Mr. Lopes was (in 1867) appointed Recorder of Exeter. In the following year, by the favour of the then owner of Werrington Park, he was returned as M.P. for Launceston—a constituency which he continued to represent in the Conservative interest until the year 1874.

A recordership and entrance into Parliament is often but

the forerunner of the acquisition of "silk." It was so in the case of Mr. Lopes. Accordingly, in 1869, he was appointed a Q.C., on the recommendation of the late Lord Chancellor Hatherley.

Unfortunately, the acquisition of silk by Mr. Lopes was soon followed by a serious disagreement between him and the late Mr. H. T. Cole, who was already a Q.C.—a result which the profession well know often follows when a junior in the chambers of a practising Q.C. takes silk, and appears likely to himself become a rival for the same class of business, and for the patronage of the same clients. The name of the future judge accordingly appears in the *Law List* for 1870 as at 2, Paper Buildings, Temple, whither he had "emigrated," where he had taken chambers, which he continued to hold up to his death, still occupied by the present Lord Ludlow. No good purpose would be served, however, by discussing in any detail the incidents of the rupture with the late Mr. Cole. It is enough to say that it, unfortunately, proved to be permanent, and caused a disappointment to many who (like the present writer) joined the circuit about this period, since it prevented them from becoming on terms of intimacy with two men, each of whom was, in truth, an excellent fellow, but prone to suspect any member of the Circuit, who was at all closely connected with the other, of "taking sides." It was the common misfortune alike of Cole and Lopes that no one of weight, or of an age which would justify him in intervening in a misunderstanding between two men junior to himself, was still left upon the circuit after both Karlake and Coleridge—who had themselves somehow contrived to be always rivals, but never other than friends—had almost simultaneously left it.

Launceston, the borough for which Mr. Lopes had been returned in 1867, was notoriously a "pocket borough," though it was one of the best type. It often returned eminent public men (the present Lord Chancellor and

Attorney-General having both, for instance, sat for the borough after Lopes), and was free from those gross forms of corruption which existed so notoriously in so many of our West Country boroughs, that none of them need be specified. Nevertheless, the M.P. for Launceston was almost, invariably returned for that borough at the bidding of the owner, for the moment, of the adjacent manor of Werrington Park.

About 1874, and in the years immediately succeeding it, Werrington Park more than once changed owners, and the borough of Launceston made a corresponding change in its M.P. For the law, with that strange inconsistency which sometimes permits it, especially if statute-made, to strain at gnats, but to swallow camels, long tolerated it that the owner of Werrington Park should return the M.P. for Launceston. A few years after Lopes had ceased to represent the Borough, an owner of Werrington Park, who had acquired the means to buy it by the pursuit of a trade abhorrent to Sir Wilfrid Lawson, being "heckled" at a town's meeting about his zeal in preserving rabbits, having hastily exclaimed, "D—— the rabbits; shoot 'em all," it was held that the majesty of the law had been violated by this open disregard of property and morals, the lord of Werrington who had been guilty of this outrageous act was unseated, and his "influence" in the Borough was thereby severely shaken. But in 1874, the influence of Werrington was still unbroken in the constituency; and Mr. Lopes, in consequence of the borough having changed hands, received a hint, more or less gentle, that he would be wise to seek the suffrages of another constituency. There being no opening for a Conservative candidate in the family seat at Westbury, the Q.C. of the Western Circuit gallantly assailed the adjacent borough of Frome, which had not long before returned to Parliament the well-known author of *Tom Brown's School Days*. The members of the Western Circuit heartily, so far as they could, gave moral and material support to the candidature of their

leader. Occupiers of chambers in the Temple of long standing will recollect that, not many years ago, a curious anachronism on wheels, which they were told on inquiry was "the Western Circuit van," used to periodically make an appearance in the neighbourhood of King's Bench Walk and Paper Buildings, just before the commencement of each circuit. In the summer of 1874, and immediately before the Frome election, it was discovered that the circuit was in dire need of a new van, and that this could not be more conveniently or cheaply procured than from Frome! The writer, innocent of the merits of the case, thought that a van at all was a needless luxury for the circuit, especially as it cost the members far more to pay the railways for taking the van round circuit, than individual members of it would collectively have paid for the carriage of their luggage, and he, while in this state of ignorance, ventured to question the wisdom of acquiring a new circuit van. The only supporter, however, whom he was able to obtain for an amendment which he brought forward in opposition to the motion for acquiring a new van, was the son of the proprietor of a Radical newspaper at Plymouth. The latter, on the "inward significance" of the matter being properly explained to him, being himself a good fellow, promptly withdrew his seconding of the amendment. Men of all shades of political opinion then unanimously voted for acquiring the new "necessary," even the writer, and the son of the Radical newspaper proprietor, joining in this action. The van was duly ordered, through Lopes's old pupil, the then "baggage master," to be built at Frome, regardless of expense! In after days, and when the new van had fallen into decay and disuse, it used to be scoffingly said of this van, that it had once carried a Frome election, but that it had never carried anything else! At all events, the Western Circuit Van, with the assistance, probably, of his not inconsiderable local influence, at the ensuing Frome election, in 1874, got Mr. Lopes returned as member for that borough.

As an M.P., both when sitting for Launceston and subsequently for Frome, Lopes greatly interested himself in promoting legal and professional reforms—a subject in which lawyers usually shine more brilliantly, and are of more public service, than when they venture to dabble, as some have unfortunately done before now, in the troubled waters of party strife. Mr. Lopes, Q.C., M.P., greatly interested himself in (among other things) the earlier series of the Bills of Sale Acts, one of which was piloted by him through the House of Commons. He also made an attempt to pass a Bill for the reform of the Jury Laws, which was a comprehensive measure, containing over a hundred sections. But where Coleridge had failed, it was no discredit to Lopes not to succeed. The latter had, however, attracted the attention of the Government, who, as he himself told the writer, “gave him nights” on which to advance measures of which he was in charge. Better still, he had achieved what is usually the sole ambition of every legal M.P. For by party fidelity and docility, as well as by a readiness to make himself useful whenever he might be wanted, he had ingratiated himself into the goodwill of the “whips” of his party.

Just at this time a terrible railway disaster at New Cross, in which numbers of persons were injured, resulted in a large crop of actions being brought against the Brighton Railway Company. The accident was fortunate for Mr. Lopes, Q.C., since it brought him into public notice just at the right moment, in consequence of his appearing for the railway company in every contested claim for compensation arising out of this calamity, and on his within a short period holding over one hundred briefs on their behalf. From this time he became recognized as the most experienced leader at the Bar in cases where the plaintiff complained of “shock to the nervous system”—a disorder which often proves curable by no known means short of a verdict for a sum sufficiently large to relieve the sufferer’s mind of the tension with which



it is naturally affected, between the happening of the accident and the return of such a verdict.

The careful and subtle style of Mr. Lopes's advocacy may be learned from a single example. In the autumn of 1876 he was engaged, with a junior, as counsel, in this instance, on behalf of the claimants, on an inquiry to assess the compensation to be paid by a railway company for a local infirmary which they had taken. It was, in truth, a matter of extreme difficulty to obtain another freehold site in the town where this charity was located; indeed, the real difficulty was so great that most people, and especially a jury inquiring into a claim against a railway company, would be likely to regard it as incredible. It would have been vain to tell the latter that all the available sites were held on ninety-nine years' leases, granted by the trustees of the estate of a neighbouring nobleman, while the constitution and endowments of the infirmary made it imperative for that institution to be maintained on a *freehold* site. The experienced advocate well knew the smile of but half credulity with which such a statement would be received by a jury, whether it were directly made to them by the claimants' counsel, or fell from the lips of "expert" witnesses. Lopes, however, was determined that the attention of the jury should be somehow drawn to, and riveted on, this fact. He was equal to the occasion. With great ingenuity, after a solemn conference with the junior, he gravely took what he termed "a preliminary objection" to some of the formalities under the Lands' Clauses Act, which the railway company had been obliged to go through. The under sheriff, an excellent lawyer himself, but quite innocent of the *nisi prius* tactics which had suggested the taking of the "preliminary objection," being more than a little puzzled by the subtle technicalities advanced by the claimants' counsel, at last asked, "Why, Mr. Lopes, don't you want to sell to the railway company? Most people do." This gave Lopes a chance to, as it were

incidentally, explain matters, an opening of which he was not slow to take advantage. With great tact, he himself afterwards said nothing to the jury about the point, leaving his skilled witnesses to explain in cross-examination (that "two-edged sword," as the late Lord Coleridge has been heard to call it) the reason why their valuations were so high! In the result, the jury returned a verdict so eminently satisfactory to the infirmity that the "preliminary objection" was not further persevered with, or ever "taken to a higher court." This fate was reserved for Lopes himself, who within a few weeks was (at the commencement of Michaelmas Term, 1876) made a Judge of the Queen's Bench Division. Long after he was on the Bench he would, with sly humour, on appropriate opportunities, ask the junior who had been with him in this case, probably his last of importance at the Bar, whether he had taken "any preliminary objection" at the trial, or, sometimes, whether he was "going to take a preliminary objection?" putting the question in the most quiet and solemn manner, with great emphasis on the first syllable, and with a merry twinkle in his eye. His judgeship was conferred upon him during the second Disraeli administration, on the recommendation of Lord Chancellor Cairns.

The appointment has been frankly acknowledged to have been mainly a political one, but the position which Lopes had attained, alike in Parliament and at the Bar, amply justified it, and so also did subsequent events.

Mr. Justice Lopes rapidly acquired a great reputation as a *nisi prius* judge. This was attained by his unfailing patience and courtesy, and by the tenacity with which his experience as an advocate taught him to ever keep in mind the wise declaration of Bacon: "Let not the Judge meet the cause half way, nor give occasion to the party to say his counsel or proofs were not heard;" the same writer's remark that "It is no grace to a judge first to find that which he might have

heard in due time from the Bar, or to show quickness of conceit in cutting off evidence or counsel too short, or to prevent information by questions, though pertinent ; " and the criticism of the same writer that " an over-speaking judge is no well-tuned cymbal." Mr. Justice Lopes was never known, after the fashion of some inferior Chairmen of Quarter Sessions, to interrupt a subtle cross-examination with the remark, " I don't see what you are driving at," put in forgetfulness of the fact that if the object of the question be at once apparent to a judge, who as yet knows little about a case, it will also become obvious to a shrewd witness, who is well acquainted with the facts, and that it will consequently never receive a candid answer.

When, soon after his appointment, Mr. Justice Lopes was permitted to go his old circuit, an incident occurred upon it which well exemplifies his general demeanour on the Bench. In a case tried before him, a woman swore positively that she had entrusted a sum of some £600 to her local preacher. There was no corroboration, and the preacher asserted, with equal vehemence, that he had never had a penny of the woman's money, and that her whole story was a fabrication. In cross-examination, it soon became apparent that the weakness of the man—who on week-days acted as agent for a local bank in the small Cornish town where he was resident, while he preached and " led " prayer-meetings on Sunday—was his vanity as to his vast knowledge as a financier. The cross-examining counsel indulged this vanity, and let the witness display his knowledge of Stock Exchange matters to his heart's content, the judge meanwhile sitting apparently stolid and unmoved, but in reality closely following the cross-examination with that considerable knowledge of business which he himself possessed. The woman had incidentally mentioned that, on one occasion, the defendant had told her that he had invested her savings in " Ottawa Bonds," and had shown her some such bonds. Curiously enough, the

conversation, for such it had become, between the cross-examining counsel and the witness turned upon the eligibility of Municipal Bonds of Cities in the Colonies as investments. Asked to recommend such an Investment, the village financier enlarged upon the merits of Ottawa Bonds, and displayed such a familiarity with them that the question, "I suppose you have dealt in a good many of them," appeared quite a natural one, and the witness was betrayed into a confession, that he *had* dealt in those securities before now, and at last into an admission that he had done so at about the date at which the plaintiff swore he had undertaken to make an investment for her. At this point, the witness grew nervous, and it being noticed that he was anxiously fidgeting with something in his pocket, was boldly asked what it was. The judge insisted on an answer to this inquiry, with the result that the witness reluctantly produced Ottawa Bonds to the value of £600! Calm and unperturbed, Mr. Justice Lopes, on this, quietly said, "Let me see which issue they are," and then, on their being handed to him, addressed the officer of the Court, with the remark that he thought he would be the best person to take care of them for the present. Finally, the penitent thief made an abject apology, confessing his theft and perjury, but beseeching that he might not be prosecuted. With "an over-speaking judge" such a cross-examination and such a result would have been impossible.

It was not only at *nisi prius*, however, that Mr. Justice Lopes was eminently successful, as a judge of first instance. He more than once presided in the Divorce Court with such success that many members of the Bar hoped that he would have eventually become President of that Court.

Fate, however, had a different future in store for the learned judge. After he had sat on the Bench for less than ten years, his powers were put to one of the severest tests to which those of a judge or advocate can be subjected. Only persons who have taken part in such a trial can realize how extremely

difficult it is to conduct even an ordinary case, if one of the litigants "appears in person." There is the ever present danger on the one hand that, by too strict an application of the rules of Law, the sympathies of the jury, and of the public, who are jealously watching what they regard as an unequal contest between the professional advocate and the "plain man" coming out from amongst them to do battle, may be unduly prejudiced in favour of such a litigant; and there is a no less danger, on the other hand (which is aggravated where the litigant in person, though he may not boast of it, really possesses considerable acumen and knowledge of law), lest substantial justice should be done to the other side, by permitting too great a latitude. Under such circumstances, the task of both judge and of the opposing advocate is always a heavy one, while unquestionably that of the judge is the more burdensome of the two. In September, 1885, it fell to the lot of Mr. Justice Lopes to try Mr. Stead for a publication which it was contended was legally an "indecent" publication, and was certainly indelicate, and in the worst of taste, likely, in any case, in the opinion of many, to effect more harm than good, by the exposures which it purported to make. The defendant, however, was no ordinary opponent, or unskillful litigant. Golden opinions of the judge were, nevertheless, won from the public by the manner in which the trial was conducted by Mr. Justice Lopes.

As hinted in an earlier page, Devonshire men watch each other's successes with much care. The then, and present, Lord Chancellor affords no exception to this rule. The first Salisbury Administration was at that time in office, and in it Lord Halsbury filled the office of Lord Chancellor. It doubtless was an especial pleasure to him to note the place which Mr. Justice Lopes had taken in public estimation, and the general call for some recognition of his services which straightway arose. The Lord Chancellor found himself loudly called upon by the voices alike of the profession and

of the public to advance a Devonian, and we may be sure that he was not reluctant to obey the mandate to promote one who combined in himself the double qualification of, in addition to his other claims, having sprung from a county with which the Earl of Halsbury's ancestors were so long connected, and in which he himself takes deep interest, and also being an *alumnus* of the Chancellor's own University of Oxford. Accordingly, within a few weeks, the successful *Nisi Prius* Judge was promoted to be a Lord Justice of Appeal.

It would be an affectation to pretend that Lord Justice Lopes in the Court of Appeal was anything like the success which he had been at *Nisi Prius*, and in the Divorce Court. In the judicial capacity which he originally filled, he had, with steady progress, earned in the eyes of a watchful profession, won the reputation of being one of the best *nisi prius* judges that had sat upon the Bench within living memory, long before he, by a single case, attracted the attention of the public. In the Court of Appeal, however, Lord Justice Lopes had no opportunity for the exercise of those special gifts which had made him so strong as a judge of first instance. For many years he occupied the place of third judge. Even to a man of great originality, it is difficult to extract much reputation from this position. The two Lords Justices who have for the most part already given judgment, have excellently expressed all that can be said on the matter before the court; the second having probably well supplied anything which the first may chance to have left unsaid. The late Lord Bowen, conscious at the time of his promotion to the House of Lords that he had a fatal illness upon him, and that he therefore would probably occupy the place of junior Law Lord until his death, on being asked what title he would assume on his elevation, with characteristic, but pathetic wit, answered that he thought he should style himself "Lord Concurry," as he feared that title would be the one which posterity would think suited him best.

Nevertheless, when Lord Justice Lopes had formed decided opinions on any question, he did not shrink from expressing them, even though he stood alone. In the well-known case of *Yarmouth v. France* it may, possibly, be that his natural love for the horse (of which, by the way, he was an excellent judge) made his feelings revolt against that noble animal being included by lawyers as ordinary "plant." But sound legal instincts told him to distrust the case of *Thomas v. Quartermain*, and the House of Lords would appear, in the latter case of *Smith v. Baker*, to have shared the doubts about this decision which Lopes, L.J., had already expressed. Moreover, until the principle which should govern the case had been settled by the House of Lords, there was not a little to be said in support of the view taken by Lopes, L.J., dissenting from the rest of the Court, in the case of *Schofield v. Lord Leconsfield*. It will be recollected that the earlier case of *Young v. Grote* had decided that, as between banker and customer, it is the customer's duty to so carefully fill in his cheques as not to afford a fraudulent person an opportunity of filling another word into a blank carelessly left in the original drawing. Lord Justice Lopes thought that a similar duty ought to be held incumbent upon the acceptor of a bill of exchange, limited only by the amount of the stamp borne by the document when he signed it, as between himself and subsequent "holders in due course." At one time in the history of our jurisprudence, it is not difficult to imagine that this view would have been upheld for the good of commerce, and to encourage the negotiability of such documents. But the House of Lords, after duly weighing the "pros" and "cons" of this question, have decided that the view suggested cannot be upheld. Their decision, of course, finally establishes a principle for future guidance, which did not exist when *Schofield v. Lord Leconsfield* came before the Court of Appeal. It is, perhaps, to be regretted that the late Lord Justice was not content to rely solely upon the broad

ground of public policy indicated above, as there is less to be said in support of the other ground of analogy between a bill of exchange being put into circulation and a thing in its nature and *per se* dangerous (such as a loaded gun or a thrashing machine) being left exposed, by which he also sought to support his conclusions.

A few months after his peerage had been bestowed upon him, Lord Ludlow completed twenty-one years' service upon the judicial bench, and decided that he would retire from it, and pass the remainder of his life as a country gentleman, principally in his adopted county of Wiltshire. He had, already (in 1895) been elected chairman of quarter sessions for that county, and as an amateur had rendered excellent service in the administration of our criminal law with an effect reaching far beyond the county itself. In the capacity of chairman of the Wiltshire Quarter Sessions, he had, too, given very powerful and valuable support to the Criminal Evidence Bill which the great lawyer of Devonshire extraction to whom he owed his promotion to the Court of Appeal—the present Lord Chancellor—has, by passing it, raised to be one of the great landmarks of the Law of Evidence. It was for years necessary to instruct both the profession and the public in the broad principles on which it is based, especially amongst professional men and by articles in magazines such as the *Contemporary Review* which were likely to command the attention of the educated public.

His duties as a chairman of quarter sessions, and the pursuit of farming, which he had followed for some years previously, promised to afford the retired Lord Justice sufficient occupation and amusement to employ his active mind during his declining years.

Heywood, the country place to which the Lord Justice retired, was long, as will have been gathered, the ancestral seat of his mother's family, the Ludlows, who gave their name to his title. Visitors to the little town of Westbury



cannot fail to have noticed the great white horse, nearly 180 feet in length, which is cut in the chalk on the hill-side. Heywood lies almost beneath it. The late Lord Ludlow loved to point out how there were visible across his lawn, and just above the horse's ears, the ramparts of the old Danish camp of Ethandune, into which local legend long has told that King Alfred, after sore defeat, went disguised as a harper, and captivated the wild Danes by his music, while he spied out the weak places of the fortress, through which his army forced an entrance on their next attack, and that the neighbouring village of Edington takes its name from Ethan Dune, or furzy height, which was the scene of the great battle. He loved, too, to tell how Heywood itself had been built in the reign of James the First, by a now half-forgotten worthy of his own county of Devon—the Lord Ley, afterwards Earl of Marlborough, whom Milton describes in his sonnets (No. 5), to the Lady Margaret Ley, as—

"That good old Earl, once President  
Of England's Council and her Treasury,  
Who lived in both, unstained with gold or fee,  
And left them both, more in himself content,"

and in the same ode, spoke of in the now trite phrase of "that old man eloquent." The late Lord Justice loved, again, to show the board with its Latin inscription which had once been over Ludlow's house at Vevey, and made historic by Macaulay, which now rests in the hall at Heywood.

Ill-health, however, from which he had begun to suffer previously to his retirement from the Bench, followed the late Lord Justice in his retreat. It prevented his attendance at the last public dinner given by his old circuit. Friends, especially those who had not seen him for some time, were, when they met him, struck by the aged and altered appearance which he presented, and, at last, on Christmas Day, 1899, at his residence in London, Lord Ludlow passed "to where, beyond these voices, there is peace."

G. PITT-LEWIS.

## VI.—THE LIMITATION OF BRITISH SHIP-OWNERS' LIABILITY.

**L**AST year, the tonnage of British ships transferred to foreign flags within the space of twelve months reached the large total of 609,589 tons, whereas in the year 1894, the figures were only 252,165 tons, the increase being about 60 per cent. in five years. As to the size of the vessels of different nationalities, there were, in 1895, only two British and two American vessels of 10,000 tons and upwards. There are now twenty-three German ships, four American, one Dutch, and only nine English of a similar capacity. As to the total British tonnage, and the goods carried in British bottoms, it is a well-known fact that the proportion of increase is also largely in favour of foreign nations. The same comparison may be made with regard to ports. Some thirty years ago, it could be said that the accommodation in most English ports was beyond anything that could be found abroad, but to-day that statement can in many cases be reversed. In the face of this growing competition, it is, to a foreigner's mind, strange that the liability of English shipowners should be so much greater than the liability of any shipowner abroad. Is this really the case?

A comparison between the provisions of the Merchant Shipping Act and the principles embodied in the laws of all other nations, does not leave any doubt that the answer must be in the affirmative.

The foreign owner, whether in the United States or on the Continent, is only liable to the extent of the value of ship and freight. When the ship is lost, there is practically no remedy *in personam* against him. For many centuries it has been held abroad that property on land is not to be made answerable for property afloat. In England, on the other hand, the owner, whether the ship is lost or not, is always liable up

to £8 per ton, or even to £15 per ton in respect of claims for loss of life or personal injury.

The law of abandonment is not restricted to collision cases, as is the law in England, but applies to all faults, torts, or wrongful acts of the master and crew, and even to contracts which the master has made in that capacity, the owner being in no case held responsible for more than ship and freight, unless he has taken upon himself personal liabilities, or has been guilty of negligence.

The foreign limit applies to all accidents which may happen on a given voyage. Under the English rule, if a ship, English or foreign, happens to have two or three collisions on the same voyage, each of these may exhaust the £8 and £15 limit, and the owner may have to pay twice or threefold this amount.

As the only way of comparing two systems of limitation is to compare their maximum limits, the respective risks of the English owner and his foreign competitor are as follows :—

*Maximum of the foreign risk* : loss of ship and freight.

*Maximum of the British risk* : loss of ship and freight *plus* £8 or £15 per ton, for each collision, *plus* unlimited liability for accidents other than collisions.

The hardship of this state of things must be apparent to every mind : the shipping trade is a world-wide market, and not a national one. In this universal competition every one should have the same legal treatment, and it seems neither just nor politic that a nation should, by its own laws, allow its shipowners to be handicapped as against all others. Apart from the heavier burdens with which British shipowners as a whole are saddled by their laws, there are also the practical difficulties, which the lack of uniformity in the law in these matters gives rise to in the courts.

There are many points in maritime law in which the codes and statutes of the various nations differ. But generally, all nations suffer in the same way by these divergencies, and all

have, at least, this consolation, that in their own country they enjoy the benefit of their own law.

But as regards the limitation of liability, this consolation is refused to the English shipowner: for even in England he is practically unable to enforce the law of the land against his foreign competitors. Some examples will illustrate this statement, which, however strange, is entirely true.

Take the case of a collision, where the vessel which is to blame is sunk either in consequence of the accident or afterwards in the prosecution of her voyage. If this vessel be English-owned, the foreign owner of the other vessel can recover damages in the Admiralty Court from the British owner up to £8 per ton.

On the other hand, if the sunken vessel which is in the wrong is a foreigner, the British claimants on behalf of the other vessel cannot recover anything, either in England (unless her owners can be served with a writ there), because the vessel cannot be seized there, or abroad, because the foreign shipowner will immediately execute a declaration of abandonment.

If you now take the case of the wrong-doing vessel not being lost and being arrested in England, there is still no reciprocity: the British shipowner's liability will amount to £8 or £15 per ton, even if his ship is worth only £4 a ton, whereas the foreign shipowner can in such a case simply leave the claimants to satisfy themselves out of the value of the ship, thus securing practically for himself the benefit of abandonment, which the British shipowner cannot obtain.

As to the situation abroad, in some countries the law of abandonment is applied to all ships, native or foreign; but in other countries, for instance in France, a distinction is drawn: if the collision has happened on the high seas, the English law is applied to the English vessel, and her owner is compelled to pay £8 or £15 in a case where the French owner is allowed to abandon. The Court of Appeal of

Rouen applied the same principle to a collision happening in French territorial waters, but its decision was overruled by the Court of Cassation, which held that in territorial waters the French law ought to apply to all vessels.\*

It is difficult to imagine a more unjust or more chaotic state of things, and, as proved by the foregoing instances, the English shipowner is always at a disadvantage.

The Conference called together in London by the International Maritime Committee, in July of last year, under the presidency of Mr. Justice Phillimore, was chiefly occupied with the discussion of this question of liability. A preliminary debate, of which a summary was given at the time in this Review,† had already taken place, in October, 1898, at the Antwerp Conference of the Committee, but it was then resolved that this matter ought to be discussed fully in London. Every effort was made to secure an authoritative and impartial representation of the various countries and of the various interests of each country at stake. Preliminary debates and committee work had taken place in England, the United States, France, Germany, Holland, Norway, Denmark, and Belgium; and the reports thus drawn up had been printed and distributed before the meeting of the Conference, the moral authority and thorough preparation of which it would thus be difficult to dispute.

After an able inaugural address by the President, the debate was carried on for two days between opponents and partisans of the rule of abandonment. Roughly speaking, it may be said the former were chiefly to be found amongst the English lawyers, whereas the English shipowners generally, and the foreign members without a single exception, were among the latter.

The chief criticism on the law of abandonment was summed up most clearly by Mr. Gray Hill in the following words:—

\* Court of Cassation, 4 Nov. 1891. *Wilson and Sons c. Guignon et Tandonnet*.

† See L. M. & R., Nov. number, 1898.

"As regards the claim of the injured party, the British system practically provides a fund out of which he gets something, whatever may happen to the ship. Under the Continental and United States system it depends entirely upon a matter over which the claimant has no control whatever, whether the ship goes to the bottom or floats, whether she is injured much or not at all."

And, in Mr. Carver's strong expressions—

"Under the Continental system and the United States system, you throw upon the suffering claimants a part of the shipowner's risk. You say, for instance, that the cargo which is being carried is to bear the risks of the ship which is carrying it, going to the bottom."

What was the answer to this objection? It was of a double nature, one answer given by the English shipowners, another by the Continental jurists.

The first answer is this: The cargo is insured, and will be paid for by the underwriter, whatever may be the system of limitation of liability. So the owner of the goods would not be in any way affected by a change of the English system. It is true that this assumes that all cargo is insured, but exceptions are so rare as not to need consideration. Where they exist, the owner of the goods has decided to take the risk himself, and is able to pay the loss out of his accumulated premiums fund, just as the underwriter does. In addition to this, the owners of goods under the Continental system make no complaint, and the premiums for cargo on Continental or American ships are not higher than the premiums paid for the same risk on English vessels.

Even under the British system no cargo-owner relies for protection on his action against one of the colliding ships; so that the English system only compels the shipowner to insure first his ship, and secondly, his responsibility in the matter of a cargo which was already insured by its owners.

The second answer, that given by the Continental jurists,

was: If there was no such thing as insurance, only the principle of abandonment would enable maritime commerce to be carried on to any extent; nobody would venture to own a ship, if, after losing it, he could be brought into the Bankruptcy Court in satisfaction of claims arising out of the mismanagement of captain and crew.\*

There is no injustice in saying to the cargo-owner: "You start on an adventure, and the shipowner does so too. He and you are both compelled to hand over your property to a captain and a crew, which neither you nor he can practically control on the seas, and you are both exposed to the danger of losing your property by the wrongful acts of third parties. In this state of things, if you suffer some damage by the personal negligence of the shipowner, you will have your full remedy against him; but as regards the fault of those servants over whom he has no more control than you or the crew of other vessels, you will have only a remedy against his ship. He exposes his vessel to the risk, and may lose her; but when once his ship is done with, you will have no further action against him. Now, you can ship your goods or not, but if you do, you know your risk."

These two considerations seem decisive, and it may be said that if you consider the matter apart from any question of insurance, the system of abandonment is the only just and practicable one. Accordingly, if you bring in insurance, it comes to this, that the basis of the respective risks being established and fixed, every one is able to cover as much or as little of these risks as he chooses to do.

There remains, however, a practical difficulty: shipowners whose vessels are worth more than £15 a ton seem to be benefited by the present English system. I think this is

\* It should, further, not be forgotten that the liability of the master for his servants, though there is no negligence on his part, is an arbitrary provision by statute, which is introduced for reasons of policy, but is not at all a principle of natural justice or equity, and is, for instance, not admitted in the new German civil codes.

only an illusion, because the risk of having to pay, under the Continental system, more than the present English limit, is largely outweighed by the certainty of paying nothing if the vessel is lost (see Report of the London Conference, p. 173). However, it may be that those who are benefited by the *status quo* would be afraid of a change. But could not a compromise be found? It is to the credit of Mr. McArthur and Mr. Gray Hill to have moved, and of the London Conference to have adopted, such a compromise in the most simple and most easy form, embodied in the following resolution:—

“This Conference recommends for universal legislative adoption the following rule in cases of loss or damage to property arising from improper navigation, whether such property be afloat or ashore:—The shipowner shall be permitted at his option to discharge his liability either (*a*) by abandoning ship and freight, or (*b*) by paying a sum of money calculated upon the tonnage.”

It was added that this resolution had no reference to claims for loss of life or personal injuries.

The resolution was put to the vote, the votes being taken by nations, and all nations—with the exception of the delegate representing the United States, who abstained from voting—voted in favour of it. The vote of England was in favour of the resolution by ten votes to five.

Since the meeting in London this resolution has been communicated to the various associations of shipowners, underwriters, lawyers, and merchants, with which the International Maritime Committee is connected in the various countries, and has been generally welcomed and approved.

In England the General Shipowners Society in London brought the matter forward at the annual meeting of the Chamber of Shipping of the United Kingdom, held on the 14th February, 1900, and the resolution of the London Conference was unanimously approved.

Since then Mr. McArthur, one of the founders, and from



the beginning one of the most active members of the International Maritime Committee, has succeeded, with the aid of Sir Donald Currie and others, in having a clause to that effect inserted in a Bill prepared by him for the purpose of extending the present English limitation of liability to the case of damage done by ships to docks, quays, piers, and fixed objects ashore.

The wording of this Bill was to the effect that in any collision *between a British and a foreign ship* by reason of improper navigation or management without the actual fault or privity of the owners of such vessels, the owners should not be liable to damages beyond the value of their ship after the happening of the occurrence and the freight then accruing, or beyond the amount fixed by the Merchant Shipping Act.

There is this distinction between the Bill and the London resolution, that the London resolution is intended to become the general maritime law, and to apply to all ships whether of the same flag or of different nationalities, whereas Mr. McArthur's Bill only contemplated the case of collision between British and foreign vessels, and this left the present English law in force between English-owned ships. This form was certainly the more diplomatic one, because it gave the best illustration of the way in which the English shipowner suffers by the present state of things.

But it seems to have been just this diplomacy which gave rise to the chief objection of the Attorney-General, Sir Richard Webster, when the Bill came before the House of Commons.

The clause, he said, created a different rule for two different plaintiffs in the same court, in respect of injury arising out of the same circumstances, according to whether the plaintiff happened to be a foreigner or a British subject: this would be a most dangerous principle, which would give occasion for well-founded remonstrances on the part of foreign nations:.

and although he sympathized with the project of an international agreement by which the laws of the various nations would be made the same, in his judgment the bill would be a retrograde step.

Speaking as a lawyer, I am bound to admit that, from a technical point of view, it is a sound modern principle not to make any distinction between citizens of different nations as regard matters of private rights. But then it is a question whether a small infringement of this principle would be such a mischief as to justify the maintenance of the real injustice now suffered by the British shipowners. It has been said in France, "*Périssent les colonies plutôt qu'un principe!*" but no Government is able to conduct legal or political affairs on such a principle. All principles admit of exceptions. Such exceptions are not unknown to British maritime law, even in matters where they are a real hardship. Under Lord Campbell's Act, for instance, the foreign claimant is deprived of rights and remedies which the British subject enjoys. This existing distinction is clearly unjust; but the one proposed by Mr. McArthur and his friends would seem to be of a very different character.

As to remonstrances by foreign Governments, it seems beyond doubt that Governments abroad would, according to their invariable practice in shipping matters, consult their leading shipowners and mercantile men on the subject; I feel sure that I can say, on information from the best quarters, that in all interested circles abroad the proposed reform would have been welcomed as an important step towards uniformity of the law. And this is indeed very natural. Abroad, we are entirely satisfied with the system of abandonment. Mr. McArthur's bill would have allowed our shipowners the option of using it also in England, in virtue of an express provision of the statute book. What more could we wish?

As regards the application of the existing British Law

between British shipowners litigating between themselves, this would certainly not have been an object of jealousy to foreign owners. On the contrary, it seems quite clear that after a short time the statute would have been extended so as to apply to all ships, whatever their flag ; and this would have answered definitely the objection of the Attorney-General.

We must not, however, despair. A reform of such importance as that relating to the limitation of shipowners' liability cannot be carried in one day. Patient efforts will, perhaps, for a long time be necessary, but the object sought is so reasonable and just that those who are pursuing it will in the end triumph, and it is my firm conviction that they will before long have the support of the progressive mind of that distinguished lawyer, Sir Richard Webster.

LOUIS FRANCK.

## VII.—CURRENT NOTES ON INTERNATIONAL LAW.

### The Delagoa Bay Award.

The proceedings in the Delagoa Bay railway arbitration, in which the award has just (March 31) been announced, are not such as to benefit the cause of international arbitration. The agreement to arbitrate was signed in June, 1891 : and the award is delivered in March, 1900. The only question for decision was the amount of damages payable by Portugal for the admittedly unjustifiable seizure, in 1889, of a railway 81 kilometres in length, the concession for which had been granted to an American, McMurdo, in 1883, and taken up by a British company in March, 1887. The award assesses the damages for the confiscation of the railway concession, and the territory going with it, together with the interest for eleven years from the date of seizure, at roughly a million pounds : and states that the full award, with a recital of the

reasoning on which it proceeds will be shortly forthcoming. Comment on this arbitration, probably the last to be decided before the system created by the Hague convention comes into force, must therefore now be confined to pointing out that the length of time taken by the three learned Swiss jurists who formed the Court to arrive at this conclusion is greater than it has been in any of the 150 arbitrations recorded in *International Tribunals*; and this is the more remarkable when it is remembered that the only question was the assessment of damages for a short length of railway. This delay will probably suggest to nations who go to arbitration under the Hague Conventions procedure the expediency of making a representative of each side a member of the Court in order to expedite matters, or fixing by treaty a time limit within which the award must be given.

#### Right of Search.

The diplomatic correspondence regarding the seizure and search of the German mail ships *Bundesrath*, *Herzog*, and *General* by British cruisers and port authorities in African waters last December and January (*Bluebook Africa*, 1900, No. 1) constitutes an important precedent in prize law. These ships were detained and searched on suspicion with no result, the first two being captures off the South African coast, and the last being detained at Aden. The German Government demanded their immediate release on the grounds (1) that proceedings in the Prize Court as regards the first two were not justified, no contraband being proved to be on board when visited; and (2) that if goods of the nature of contraband were on board the *Bundesrath*, they could not be treated as contraband, being destined to a neutral port in a neutral ship, according to the recognized principles of international law, and the view taken by the British Government in the *Springbok* and *Peterhoff* cases in the American Civil War and expressed in the Admiralty Prize Manual that the

destination of the ship is conclusive of that of the goods. Lord Salisbury in reply refused to recognize either of these general principles. He pointed out that our Government accepted the decisions in the American Prize Court at the time (and indeed the republished correspondence of that time shows that they were considered in accordance with English law); declared that the Admiralty Manual did not possess any official authority, and that its quoted rule was not applicable to the case of war with an inland State communicating with the sea only over a neutral railway to a neutral port; and finally quoted Bluntschli to the effect that ships or goods only sent to the destination of a neutral port in order the better to assist the enemy are contraband and confiscable. He, however, expressed his willingness to pay compensation assessed by arbitration for the detention, and undertook that no more mail steamers, *i.e.* steamers of subsidized lines, should be arrested on suspicion only, and that no search should be made for contraband at a distance further than Aden from Delagoa Bay.

As regards the first objection taken by the German Government, and the rule proposed by Count Bulow that arrest of ships shall be only allowed in case of their resistance to the order to stop, or of irregularity in papers or the revealed presence of contraband, it is enough to say that, alike by British and American prize practice, arrest is allowed on suspicion; "if there be a reasonable suspicion of illegal traffic or a reasonable doubt as to the proprietary interest, the national character or the legality of conduct of parties it is proper to submit the cause for adjudication before a proper prize tribunal, and the captor will be justified although the Court should acquit without the formality of ordering further proof" (Story, J. *The George* [1815] 1 Mas. 24). The reason for this is that the captor acts subject to the liability of having to pay demurrage damages and costs in the event of

the ship's restoration, as the records of the British Prize Court show: and it is very important that the jurisdiction of the Prize Court should not be interfered with.

For the second objection no doubt there is more foundation. The former cleavage between the British and American views on the subject of "continuous voyages" (alluded to in these Notes of the last number of the Magazine) is best shown by the fact of an English court refusing to hold a cargo contraband under a policy of insurance which the U.S. Supreme Court had condemned as such (*Hobbs v. Henning* 17 C.B.N.S., 817: *The Peterhoff*, 5 Wall, 56). The rule as stated in the Manual is based on Lord Stowell's decisions; and a considerable body of high legal and juristic opinion, both at the time of the *Springbok* decision and since, have regarded it as an unjustifiable extension of the "continuous voyage" principle, which constitutes a serious encroachment on the freedom of neutrals. Practice, however, has proved stronger than theory; and Italy in her Abyssinian war adopted the American view, in circumstances very much resembling the present. Its justifiableness seems to depend on the extent to which it is allowed to apply: and if ever justifiable, it is certainly so in a case like the present, where the ordinary rule would be a nullity. Count Bulow, in his proposed rules for international acceptance on this subject, had to admit that this principle of the Manual for which his Government contended "had not yet met with universal recognition in theory or practice." The effect of Lord Salisbury's answer on our prize law is not, however, that the principle of the Manual is abandoned, but that in circumstances where its full application would enable freedom of neutral commerce to pass the line of belligerent necessity, it is restrained to that necessary extent.

#### **Martial Law in Enemy's Country.**

The occupation of the Orange Free State's territory by British forces carries with it the right and duty to enforce

martial law. The Duke of Wellington once in Parliament described martial law as being neither more nor less than the will of the General, in fact, no law at all; and said that he himself had in another country carried on martial law, and had governed a large proportion of the population there by his own will, and his method of doing so was by declaring that the country should be governed according to its own national laws, and so governing it that political servants and judges consented to act under his orders, and the judges sat in the courts of law conducting their judicial business and administering the law under his direction. There can be little doubt that this course would be followed by any general at the present day; indeed as between nations parties to the Hague Convention relative to the laws and customs of war on land this is now a treaty obligation, and Great Britain must be regarded as having adopted it as a general principle of conduct, although her adhesion to it is not yet ratified, and it has no application in the present war against States which were not party to it. The preamble contains a declaration that it is impossible at present to frame stipulations extending to every case which might present itself in war, but still that unforeseen cases should not be left to the judgment of military commanders, but should be placed under the safeguard of the law of nations, the law of humanity, and the requirement of public conscience; but the projected Convention was described by the British military delegate at the Conference as "a valuable exposition, so far as it goes, of the laws and customs of war as now accepted for land warfare," and it certainly embodies most of the rules of warfare sanctioned by the existing practice of civilized nations. It is to be noted that the Hague provisions on the point now under consideration are more general than those of the Brussels Declaration of 1874. The latter provided that "in the case of occupation, the authority of the legal power being suspended and having actually passed into the hands of the

occupier, he must take every step in his power to re-establish and secure, so far as possible, public safety and social order; with this object he will maintain the laws which are in force in the country in time of peace, and will only modify, suspend, or replace them by others if necessity oblige him to do so. Functionaries and officials of every class who at the instance of the occupier consent to continue to perform their duties shall be under his protection, and shall not be dismissed or be liable to summary punishment unless they fail in fulfilling the obligations which they have undertaken, and they shall be handed over to justice only if they violate their obligations by unfaithfulness." The recent Convention only provides that "the authority of the legal power having actually passed into the hands of the occupier, he will take all the measures which he can with a view of re-establishing and securing, so far as possible, order and public life by respecting, except where absolutely prevented, the laws in force in the country."

Unless and until occupied territory is annexed or ceded, the municipal law of the occupying State does not prevail there. In English law, after cession or annexation, the inhabitants of the territory become British subjects; if the Crown does not set up new laws there, the inhabitants keep their old ones, and previously passed British statutes do not extend to them, though Parliament can legislate for them. After conquest, and *a fortiori* after mere occupation, martial law may still be in force; and *bello flagrante* or *nondum cessante*, although civil courts are established and exercising jurisdiction there, the acts of executive officers done for State purposes there against individuals are acts of State and not actionable in the civil courts (*Hopkinson v. Bedreechund* [1830] 1 Knapp P.C. 338).

#### Conflict of Law.

A recent case, *In re Maudslay Sons and Field* [1899] (16 Times L. R. 228), illustrates a point which seems likely to



recur in private international law, namely which law is to prevail in a case where there are rival creditors' claims against the property of a common debtor under assignments of which one is valid by the law of the debtor's domicile, and the other by that of the law of the country where that property is situate, *lex domicilii* or *lex situs*. The facts were that an English company was being wound up, and a receiver appointed on behalf of the debenture holders, who were entitled to satisfy their claims out of all the assets of the company ; among the assets was a debt due from a French firm, but another French firm which was a creditor of the company on a bill of exchange, by giving notice to the other firm and registering the bill, obtained what by French law was a valid assignment of the debt ; and the debenture holders thereon applied to the English Chancery Court for an injunction to the unsecured French creditors against enforcing their rights under French law against the fund. On an opinion being given by some French lawyers that the receiver would have no rights in France as against the attaching creditor to the fund, the Court held in accordance with the previous decisions in the point stated in Dicey, *Conflict of Laws* (R. 141), that as France was the *situs* of the debt the French law must prevail.

Dicey states the rule to be that the assignment of a moveable which cannot be touched (debts), giving a good title thereto according to the *lex situs*, of the debt, in so far as by analogy a debt can have a *situs*, is valid. The case of *In re Queensland Mercantile and Agency Co.* [1891] (1 Ch. 536) seems directly in point. There a Queensland company had issued debentures charging the unpaid capital receivable in respect of certain of its shares, some of which were held by an English bank ; this capital was called up, but before it was paid a Scotch company brought an action in Scotland against the Queensland company for negligence and arrested

under Scots law the calls on the shares in the Queensland company which were held in Scotland, the holders of which had no notice of the debentures, which proceeding was by Scots law equivalent to an assignment with intimation or notice to the debtor, and took priority over an earlier assignment without intimation; the English bank urged that the law of Queensland should prevail, as being the *lex domicilii* of the creditor, but the Court held that, although according to the maxim *mobilia sequuntur personam*, a transfer of personal or moveable property which by the law of the owner's domicile is valid wherever the property is situate, still it must uphold another equally known rule of law, viz. that a transfer of moveable property duly made according to the law of the place where the property is situated is not rendered ineffectual by the fact of such transfer not being in accordance with the law of the owner's domicile. This rule has also been acted on in cases on dealings with bills of exchange (*Alcock v. Smith* [1892] 1 Ch. 235). Story, in discussing this question, seems to incline to this view; and although, as he says, a debt is not a *corpus* capable of local position, but purely a *jus incorporale*, still where there is a conflict between domiciles of creditors the *lex situs* may well be looked to to decide the priority, and it has always been recognized that its express directions as to mode of transfer must be followed.

### Bankruptcy of Foreign Firms.

In these notes in the last issue of the Magazine, an endeavour was made to show that by degrees the legislature and courts have advanced up to the point of treating foreign firms carrying on business within English jurisdiction as subject to English jurisdiction in almost all respects to the same extent as foreign corporations and foreign individuals so doing. The recent case of *In re A. B. and Co.* (March 3),

shows, however, that the Court of Appeal is not disposed to extend this jurisdiction to a question of *status*, in holding that, in the absence of express enabling words to that effect in the Bankruptcy Act, 1883, an English Court has no power to allow such a foreign firm to be made bankrupt, and so alter its *status*, where the debtors have by deed in a foreign country executed an assignment of all their property to a trustee (the manager of their business there) for the benefit of their creditors there, and have afterwards given notice to English creditors that they have suspended, or are about to suspend, payment of their debts. This decision follows the former ones given under the Bankruptcy Act, 1869, as well as that of 1883, which proceeded on the general ground that English legislation, unless the contrary is expressly stated or plainly implied, is only applicable to English subjects, or to foreigners making themselves liable during a stay in England to English jurisdiction, and that "the act of bankruptcy must be a personal act, and cannot be committed by or against a firm as such" (*Ex parte Blain* [1879] 12 Ch. D. 522; *In re Pearson* [1892] 2 Q. B. 263). The words of the Bankruptcy Act, 1883, are certainly wide enough to bring within its provisions such a case as the present, where the act of bankruptcy takes place in a foreign country, if it were not for the above principle adopted by the Courts, and first acted upon under the statute of 1869, which, however, did not contain the provision of the present statute, allowing not only debtors domiciled in England, but also those who within a year previously have ordinarily resided or hired a dwelling-house or place of business there, to be made bankrupt; but, the present settled law seems to be that unless the act of bankruptcy be committed in England, a foreigner, though trading here, cannot be made bankrupt, and a foreign firm cannot in any case, though its members may be.

G. G. PHILLIMORE.

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## VIII.—NOTES ON RECENT CASES (ENGLISH).

In *Powell v. Powell* (44 S.J. 134) Farwell, J., gave a very proper rebuke to the parties who had suffered a young lady, just of age, to execute a settlement in favour of her step-mother and step-brother and sister. The young lady was absolutely entitled to a certain sum of money under the marriage settlement of her parents on attaining 21 years. The step-mother advised her shortly after she came of age to execute the above settlement. The solicitor who prepared the same acted first of all for the step-mother alone, and afterwards for the plaintiff as well. The learned judge set aside the settlement. We are not surprised. For many years it has been well settled that no one standing in a fiduciary position to another can retain a gift made to him by that other if the latter impeached the gift within a reasonable time, unless the donee can prove that the donor had independent advice, or that the fiduciary relation had ceased for so long a time that the donor was under no control or influence whatever. The donee must show, and the onus is on him, either that the donor was emancipated, or was placed by the possession of independent advice in a position equivalent to emancipation. It is sufficient to refer to *Archer v. Hudson* (7 Beav. 551), *Wright v. Vanderplank* (4 W.R. 410), and the cases collected in the notes to *Huguenin v. Baseley* (1 White and Tudor's Leading Cases, 247). It is not a question of actual possession, or deception, or undue advantage, or want of knowledge of the effect of the deed. The mere existence of a fiduciary relation raises the presumption against the donee, which must be rebutted. Moreover the solicitor must be independent of the donee in fact, and not merely in name; and this he cannot be if he is solicitor for both parties. Subject to these restrictions, if a transaction, say between a parent and child, be reasonable and entered into willingly, the Court will not interfere. Such

was the case in *Blackborn v. Edgeley* (1 P. Williams, 600), where a son in affluent circumstances gave his father a bond promising to pay him an annuity for life. It was the free act of the son, there was no proof of fraud, and Equity refused to set the bond aside.

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By the Larceny Act of 1868 (31 & 32 Vict. c. 116), if any person being the member of any co-partnership, or being one among other beneficial owners of any money or property, steals or embezzles any money or property belonging to such co-partnership or to such joint beneficial owners, he shall be liable to be dealt with as if he had not been or was not a member of such co-partnership or one of the beneficial owners. It was, however, held in *R. v. Robson* (16 Q.B.D. 137) that an association having for its object not the acquisition of gain but the spiritual and mental improvement of its members, is not a "co-partnership" under the above Act. Consequently a member of such an association who has embezzled monies belonging to it cannot be convicted of embezzling the monies of a "co-partnership" under this Act. The association was the Bedlington Colliery Young Men's Christian Association. It is pleasant to note that the edge of the above decision has been somewhat blunted by the recent decision of the Court for Crown Cases Reserved in *Reg. v. Neat* (108 L.T. 224). There the Court held that A., a member of a committee formed from the committees of certain friendly societies for the purpose of organizing and carrying out the arrangements for a *fête*, could properly be convicted of stealing money in which other persons were interested as beneficial owners, within the above Act. A had obtained possession of the entrance money and appropriated it to his own use. The members of the committee guaranteed the expenses of the *fête* and were entitled to apply the entrance money towards the extinction of any liability so guaranteed.

The decision in *National Sporting Club, Limited v. Cope* (108 L.T. 369) is distinguishable from *Graff v. Evans* (8 Q.B.D. 373). In the latter case, the manager of an institution, carried on *bonâ fide* as a club, under rules by which members paid an entrance fee and subscription, had in the course of his employment supplied intoxicants to a member (who paid for them) for consumption off the premises. All the club property was vested in trustees, and there was a committee of management to conduct the general business. The club was not licensed for the sale of intoxicating liquors, but these were supplied at fixed prices to members for consumption on and off the premises, 33 per cent. above the cost price being charged for liquors to be consumed off the premises, and the money produced thereby going to the general funds of the club. It was held by the Queen's Bench Divisional Court that the manager did not "sell by retail" intoxicating liquors within the meaning of section 3 of the Licensing Act, 1872 (35 & 36 Vict. c. 94). But in the case just decided the institution was a joint stock company carrying on the business of a club under the name of the "National Sporting Club, Limited." Shares in it were held by persons who were not members of the club. The company sold intoxicating liquors to members of the club on the club premises. It was held by the Queen's Bench Divisional Court that the company was carrying on the business of a proprietary club, that the proprietors as a company constituted a separate legal entity distinct from the club, and also distinct from the shareholders, and that the transfer of intoxicants by the company's servants (who were nominally the club's servants) to members of the club was a sale by retail. While not deciding whether a proprietary club may not be so constituted as not to be within the Excise Acts, or that a company may not be constituted out of the members of a club, so as to be within the law applicable to members' clubs, we merely draw attention to the fact that in this recent

case the shareholders of the company and the members of the club were not the same persons, and that the profits from the sale of the liquors belonged not to the club but to the company.

The well-known section 4 of the Statute of Frauds was once again considered by Buckley, J., in *Hucklesby v. Hook* (35 L.J. 151). There the plaintiff called on the defendant, the proprietor of a hotel at Clacton-on-Sea, and offered to purchase certain land of him. The plaintiff wrote on a sheet of the defendant's hotel note-paper, on which was printed the name and address of the defendant, his (the plaintiff's) own address, date, and words implying that he (the plaintiff) agreed to purchase certain land of the defendant at a certain price. The next day the plaintiff sent to the defendant a cheque in payment of deposit; and the day after the defendant wrote to plaintiff that the land was not for sale, and returned the cheque. On the plaintiff bringing an action for specific performance, Buckley, J., found that the defendant took the letter-paper out of the paper rack, that the agreement was not written (as alleged) at the dictation of the defendant, but that the defendant wanted the plaintiff to put something in writing, and that the plaintiff asked the defendant to countersign it, but that he refused, saying that he never signed documents except in the presence of his solicitor. Buckley, J., decided in favour of the defendant, on the ground that there was no sufficient memorandum in writing to satisfy the statute. It is plain that if the defendant had *verbally* accepted the written offer of the plaintiff, he would have been bound. This was so held in *Reuss v. Picksley* (L.R. 1 Ex. 342). But in the case just decided, the printed words at the head of the note-paper were not really any part of the memorandum, and the plaintiff, by writing his own address underneath the printed heading, in effect struck them out. The cases show that signing, for the purposes of the statute,

does not necessarily mean writing a name, but it is enough if the document be ratified in some way by the writing of the person to be charged. In *Schneider v. Norris* (2 M. & S. 286) the defendant wrote the plaintiff's name on a paper containing the name of the defendant in print. In *Evans v. Hoare* (61 L.J.R., Q.B. 470) the defendant's agent wrote the whole document on which the defendant's name was contained. And in *Torret v. Cripps* (27 W.R. 706) the defendant wrote and sent the letter, but it was not signed by him; the principle being that if such a document were recognised by the defendant sending it to the plaintiff, there was enough to satisfy the statute. In the case before us the defendant wrote no part of the document, and the other facts did not help the plaintiff.

The month of March was productive of cases elucidating the obscurity of the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37). *Mason v. Dean* (108 L.T. 392) decides that where A. contracts with the owner to build him a theatre, power being reserved in the contract for the owner to put part of the work of decorating the building into the hands of another contractor, and M., a workman employed by this other contractor (D.), is killed through a loose plank of a scaffold erected by A., that D. is an "undertaker" within the Act. Then *Cooper v. Davenport* (44 S.J. 311) decides that a sub-contractor is not an "undertaker;" and, in so deciding, the Court followed *Cass v. Butler* (44 S.J. 277), decided by the same Court earlier in the month. Next we have *Milner v. Great Northern Railway Co.* (108 L.T. 442), which ungallantly, but quite logically, refused a barmaid compensation for injuries sustained by the fall of a framed advertisement on her in the refreshment-room of a railway station; the Court holding that the plaintiff's employment was not "on, or in, or about" a "railway" within the meaning of the above Act. Then, *Lysons v. Andrew, Limited*



(108 L.T. 442), which held that before a workman can be entitled to compensation under the above Act, he must have been working at least for two weeks for the same employer in the employment in the course of which the accident happened. Lastly, *Powell v. Main Colliery Co.* (108 L.T. 489) decides that no compensation can be made under this Act unless the request for arbitration be made within six months from the occurrence of the accident.

“When is a house not a house?” This new forensic riddle was evolved in the case of *Kimber v. Admans* (35 L.J. 147), where the plaintiff bought one of several plots of land, which plots were sold subject to certain covenants. One of these was that not more than one house should be erected on any one plot. The defendant was also a purchaser, and proposed to erect on his plot a block of buildings containing flats. The plaintiff alleged that such a building constituted more than one house. Cozens Hardy, J., denied this, and the Court of Appeal confirmed his decision. In *The Attorney-General v. Mutual Tontine Association* (45 L.J.R., Exch., 886) the Court of Appeal held that duty was properly charged upon the entire block as one “house,” and not upon the separate suites of rooms as distinct properties. This decision is concomitant with the recent case. We should, however, observe that in *Rogers v. Hosegood* (69 L.J.R., Ch. 59), decided last November, the Court held that a block of flats is not one messuage but several; and it was not evident if there was any substantial difference, for the purposes of the covenant in dispute in that action, between a terrace of adjoining residences separated from each other vertically, and a pile of residences separated from one another horizontally.

SHERSTON BAKER.

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER  
LENGTH IN SUBSEQUENT ISSUES.]

*English Political Philosophy from Hobbes to Maine.* By WILLIAM GRAHAM, M.A. London: Edwin Arnold. 1899.

Mr. Graham, whose previous work on Socialism is well known, has produced a very interesting, as well as a very instructive book. He has selected for examination the theories of six influential English political thinkers, namely, Hobbes, Locke, Burke, Bentham, J. S. Mill, and Maine, with the object of producing, by exposition and criticism, an introduction to Political Science, and "a set of reasoned conclusions on the more important and fundamental and recurrent topics that might be useful to all who take a rational interest in politics and political questions." The authors are well selected, as having exercised immense influence, and as illustrating "the different schools of political thought," and also the different methods adopted in the examinations of such subjects, from the pure Deductive Method of Hobbes to the Historical Method of Maine. Mr. Graham gives a careful and clear abstract and analysis of the principal works of each of these great men, accompanied with acute criticism. It is particularly interesting to follow him in his comparisons, where, as may be expected, he does not limit his illustrations to the authors we have mentioned, but deals also with Rousseau, Austen, Spencer, and others, and to trace the influence the earlier thinkers exercised on their successors. Mr. Graham does full justice to the genius of Hobbes, when he describes his *Leviathan* as "a great book of a great creative intellect in a great century; on the whole, the greatest and most original, as it was the first, work in political and moral science in our literature." Mr. Graham examines with care the three theories of the famous doctrine of a social contract, namely, those of Hobbes, Locke, and Rousseau, and comes to the conclusion that, "there was no social contract by which men passed from a state of nature into civil society," but the "actual social contract is the constitution, together with the fundamental civil laws protecting property and enforcing free contracts." Burke is treated at considerable length, but on the whole condemned as a reactionary, though not without his uses, "though of the negative order." Bentham he considers greatest as a law reformer, and a

political reformer, but points out in detail the many weak points in his theory of utility, and condemns his whole theory of morals, as "incoherent, shallow, and fragmentary." Mr. Graham, while paying the highest tribute to the elevated aims and character of Mill, expresses considerable doubt as to the elevating and moralizing tendency of taking part in political or public functions, to which Mill attached so much weight; but we may particularly call attention to the treatment, partly by Mill, and partly by the author, of the probable consequences of attempted Socialistic Legislation, and to Mill's hostility to the payment of Members of Parliament.

We regret that space does not permit us to allude more particularly to Mr. Graham's own opinions; but they are marked by learning, knowledge of history and economics, and solid, sober sense. We can recommend the book to the careful perusal of all "who desire to have a surer grasp of political principles, perhaps better reasons for the articles of their political creed."

We regret that the author has not thought fit to supply an index to his valuable work.

*The Principles of the Interpretation of Wills and Settlements.* By ARTHUR UNDERHILL, M.A., LL.D., and J. ANDREW STRAHAN, M.A., LL.B. London: Butterworth & Co. 1900.

The book undoubtedly supplies a want. The learned authors claim that they have sought "to extract from the mass of authorities a set of broad general principles, and to illustrate these principles by a selection of cases." These principles are contained in fifty-six Articles, and begin with the most general principles, such as that "words are presumed to have their ordinary meaning," and conclude with the consideration of "Covenants to Settle other or after acquired Property." The general arrangement is that first comes the Article, then the Authorities, frequently in the form of verbal extracts from some leading case, and then follow qualifications, arguments, and discussion of other cases. As might be imagined, some of the most difficult questions arise in the interpretation of Wills, which are subject in many cases to special rules, but after reading the Chapter on "Relationship," we think he would be a bold man who would feel confident of his ability to decide when a testator would be held to have intended "to include illegitimate as well as legitimate relations under a term of relationship," although he will have been given all the assistance that learning and ability can render. We are inclined to agree with the authors in their doubts as to whether some of the cases

would now be followed, notably the case of *In re Bolton*. Not the least useful part of the work is a glossary, intended for use in cases where no general principle can be gathered, and only references to cases can be offered.

*Ruling Cases Arranged, Annotated, and Edited.* By ROBERT CAMPBELL, M.A., with American Notes by LEONARD A. JONES, A.B., LL.B. London: Stevens & Sons, Limited. 1899. Vol. xix., *Negligence—Partnership*. 1900. Vol. xx., *Patent*.

These stately volumes continue to appear with commendable despatch, and with no diminution of the care and learning bestowed upon them. In Volume xix. the subject of *Negligence* is carried on from the last volume, and the rest is practically taken up with *Partnership*. The Twentieth Volume is entirely devoted to *Patent*, and there are to be found cases concerning inventors from Watts to Edison. On this point, as might be expected, the American notes are of great interest, and this is none the less the case when the difference in the law and practice of the two countries is pointed out. There is no reference to the important subject of Compulsory Licences, perhaps because there are no ruling cases on the subject. It is curious to note that in dealing with *Negligence* the learned editor of the American Notes has had to confess that, as regards the question of liability of contractors, "the decisions in the United States are in a state of inextricable confusion and conflict upon many of the questions arising in the application of the rule." It is also interesting to note that the American Law does not allow contracting out of Employers' Liability Acts. The value of leading cases on the law of partnership has, of course, been a good deal diminished by the codification of the law by the Partnership Act, 1890.

*The Map of Life. Conduct and Character.* By WILLIAM EDWARD HARTPOLE LECKY. London: Longmans, Green & Co. 1900.

Mr. Lecky has selected a curious title, and it is not very easy to see how it is appropriate. The subject of the book is no doubt human life, but it can hardly be said in any sense to map it out. Many of the influences that affect life and happiness are discussed, and much is said that is true, if not quite new, and said with the polished diction and wealth of illustration so characteristic of Mr. Lecky. The part that concerns our readers most is the chapter that deals with "Moral compromise in the law." It need scarcely be said that our old friend the *Courvoisier Case* turns up. No doubt

moral difficulties of that sort may occasionally occur, but they must do so rarely, and we doubt their presenting much difficulty to an honourable advocate, who knows both his duty to his client and to himself. Mr. Lecky quotes Lord Brougham's extreme statement of the duty of an advocate in his speech in defence of Queen Caroline. We much prefer Lord Chief Justice Cockburn's noble reply to a somewhat similar statement by the same noble lord, made at the dinner given to the great French advocate, M. Beresford, "The arms which an advocate wields he ought to use as a warrior, not as an assassin. He ought to uphold the interests of his clients *per fas*, but not *per nefas*."

*First Elements of Procedure.* By T. BATY. London: Effingham Wilson. 1900.

Mr. Baty, who is well known as an authority on International Law, and whose interesting contributions to the pages of this magazine are, we are sure, highly valued by our readers, has done good service to the young lawyer, be he barrister or solicitor, by the production of this admirable little treatise on a very intricate, and as presented by the standard works of reference, uninteresting subject. He warns his readers, however, that the book is not intended as a makeshift substitute for those works, but is meant to give the beginner such a grasp of the main features of the subject as will enable its details to be easily and clearly appreciated afterwards. His aim throughout has been to give his readers rather the broad practical effect of the statutes and orders of court, than the precise language of such enactments, omitting points of detail for which the student is referred to the authorities themselves. The result has justified his effort, and to those who wish to gain an acquaintance with the principles which underlie the apparently arbitrary and disconnected rules of practice, instead of committing the rules themselves to memory, we say procure a copy of this admirable little volume without delay.

*The Law as to the Appointment of New Trustees.* By J. M. EASTON. London: Stevens & Haynes. 1900. Price 7s. 6d.

In spite of the Trustee Act, 1893, the appointment of new trustees is very often by no means a simple matter, and very careful consideration has often to be given to the means by which it is to be effected. Mr. Easton has devoted great ability and learning to a treatise on this one subject, and saved all who may in future be wise enough to consult his work the labour of searching through

many other more ponderous tomes for what they will most likely find here more fully considered. Mr. Easton has not only carefully examined the cases to discover and expound what has been decided, but he has shown great ingenuity in imagining what difficulties may arise, and sagacity in applying principles to their solution. The book is very complete, and contains some useful precedents and the material sections of the Trustee Act, 1893, and the Lunacy Acts, 1890 and 1891.

*Privy Council Appeals.* By THOMAS PRESTON, F.S.A. London: Eyre & Spottiswoode. 1900.

This book should be invaluable to solicitors who may be concerned in Appeals before the Privy Council. It gives in minute detail all information they require as to the various steps to be taken, formal and otherwise, the fees charged, and costs allowed for printing, examining proofs, etc. All this information is necessary for solicitors to know, and is not very easily to be obtained except by personal application at the office. Mr. Preston, from his long official experience, is pre-eminently qualified to impart such information, and one result, at least, of the publication of his book will be a great saving of trouble both to solicitors and also to the officials of the Privy Council.

*The Stamp Laws.* By W. J. HIGHMORE. London: Stevens & Sons, Limited. 1900.

The Stamp Laws are not interesting, but it is often necessary to know something about them, under which circumstances one could hardly do better than consult this treatise. Mr. Highmore, from his official position as assistant solicitor to the Board of Inland Revenue, has had special opportunities of becoming familiar with both the law and the practice, and he has here collected all the statutes of importance which impose Stamp Duties, and also those which confer special exemptions. The cases cited are well chosen, and not so numerous as to overload the book, which is excellent in paper and type. If there is a fault to be found, we think the index might have been more complete.

*The Annual Digest, 1899.* By JOHN MEWS. London: Sweet & Maxwell, Limited. 1900.

This Digest contains all the reported opinions of the superior Courts for the past year, as well as a selection of cases from the

**Irish Reports**, and must be referred to by every one who wishes to have his case law quite up to date. It has, as usual, been carefully and accurately done; but we notice that the very useful collection of "Cases followed, etc.," is by no means exhaustive, as a number of cases are omitted that should have been included.

*Lunacy Practice.* By N. ARTHUR HEYWOOD and ARNOLD T. MASSEY, M.A. London: Stevens & Sons, Limited. 1900.

This is a very useful little book, intended for the practical use of solicitors who have to advise the relatives of persons of unsound mind, or carry out the necessary steps for the protection of the afflicted individual's person or property. It is eminently practical: gives minute directions as to the procedure, and contains a very useful collection of forms. It must be noted that it does not deal with the question of Reception Orders, etc.

## NEW EDITIONS.

**Second Edition.** *Investigation of Title.* By W. HOWLAND JACKSON and THOROLD GOSSET, B.A., LL.M. London: Stevens & Sons, Limited. 1899.

*Precedents of Purchase and Mortgage Deeds.* By W. HOWLAND JACKSON and THOROLD GOSSET, B.A., LL.M. London: Stevens & Sons, Limited. 1899.

These are companion volumes, and, although the first edition of the *Investigation of Title* was only published in 1898, a second edition has been called for, and is now issued revised, and considerably added to. The arrangement, which is alphabetical, is a very convenient one, and the information on all the most important points which have to be considered in investigating a title, is very clearly, and as far as we have been able to test it, very accurately given. We do not notice that there are quite sufficient references to the Land Transfer Acts, although in many cases it might be desirable to make searches at the Registries. The accompanying volume is a very handy one, containing nearly seventy carefully drafted *Precedents of Purchase and Mortgage Deeds*. They are as concisely drawn as is consistent with efficiency, and full advantage has been taken of the power of omitting words, clauses, etc., in consequence of various statutory provisions which are shortly summarized in tabular form in Appendix A. Instead of copious notes,

there are full references to the volume of *Investigation of Title*. We think both works will be of great use to those engaged in conveyancing work, and will more than carry out the modest hope of the author that they will "save time and labour."

**Second Edition.** *The Licensing Laws.* By R. M. MONTGOMERY. London: Sweet & Maxwell, Limited. 1900.

Mr. Montgomery has not waited for the new legislation, which is looming in the future, before bringing out a new edition. He is probably right, for it is impossible, with so many other engrossing subjects before it, and such very strong differences of opinion among its members, to say when the House of Commons will find time to grapple successfully with so very difficult a question. There are few branches of practice so full of pitfalls for the unwary as that of Licensing, and a careful and accurate work like the one under consideration is invaluable. As might have been expected, the important case of *Boulton v. Kent Jf.* is frequently cited, and attention called to the unsettling effect this decision has had on what were previously well-established authorities. Some useful additions have been made in the shape of chapters on Covenants in Leases relating to the Sale of Intoxicating Liquors, Covenants to take Liquors from the Landlord, and on Innkeeper's Liability in respect of the goods of his guests. The most recent cases are included, even one decided as lately as the 25th January last being noted in the Addenda, but the Sale of Food and Drugs Act, 1899, has not been noticed.

**Second Edition.** *Fawcett's Landlord and Tenant.* By JOHN MASON LIGHTWOOD, M.A. London: Butterworth & Co. 1900.

Mr. Fawcett has been unable to undertake the production of the present edition of his work, which has accordingly been edited by Mr. Lightwood. It is somewhat increased in size, owing partly to the additional matter necessarily introduced in consequence of recent legislation and decisions, but partly also in consequence of recasting and amplifying parts of the former work. This we think is an improvement, as it was rather too terse before, and it has gained in clearness and distinctness without becoming unduly bulky, and having the distinction of being of a convenient size for reference. The arrangement is good, and, as far as we have been able to test it, the law is well expressed and accurate. We think it would perhaps have been an improvement if rather more attention had been paid



to the law particularly affecting flats, as, owing to the great increase in the numbers of these tenements, the subject becomes one of increasing interest and importance every day.

**Second Edition.** *Where to find your Law.* By ERNEST ARTHUR JEFF, M.A. London Horace Cox 1900.

This is a new and enlarged edition of a work which was only first published in 1897, but it is obvious that to enable this book to maintain its usefulness, it must be republished at short intervals, as it indicates the leading Statutes, Cases, and Text-books on every division and subdivision of English law, it must be so constantly affected by new Acts, books, and editions that it must be a constant labour to the learned editor to keep it noted up. The learning and discrimination shown are beyond exception. We may sometimes differ with Mr. Jeff as to the respective merits of the text books he recommends or does not recommend, but we have no hesitation in recommending his book is invaluable to any seeker after the authorities on any particular branch of law.

**Third Edition.** *Brown and Thobald's Law of Railways.* By J. H. BALFOUR BROWNE, Q.C., and FRANK BALFOUR BROWNE. London Stevens & Sons, Limited. 1899.

The Law of Railways is always growing, and mainly so in consequence of legislation. The most recent and important developments have been in the direction of what may be called State regulation. Since the last edition of the work, the Railway and Canal Traffic Act, 1888, has been passed, which, with the cases decided under it, would alone justify the issue of the present edition, without taking into consideration the fact that other important Acts, such as the Light Railway Act, 1896, have become law since that date. The Acts and Orders are set out in good clear type, and are respectively followed by concise statements of the case law. The necessities of space have rendered this last almost too concise, and certainly it is in too small print to suit the eyes of many people, but most of the cases on the subject are there, quoted accurately, and as fully as the space would permit. Wisely, we think, the Employers' Liability Act has been omitted, but we think the rating of railways, a subject on which Mr. Balfour Browne is so peculiarly qualified to speak, might, with advantage, have been dealt with more fully, and we are rather surprised to notice that the very important case of *Stockport Union v. London and North Western Railway Co.* is not

referred to. The notes on the Act of 1888 are very good, and it is a great convenience to have all the Acts and Orders relating to such a wide subject, collected in one not very bulky volume, and edited by so experienced a lawyer.

**Third Edition.** *Law and Practice of Divorce.* By W. J. DIXON, B.A., LL.M. London: William Clowes & Sons, Limited. 1900.

Mr. Dixon's work treats both of the Law and Practice of Divorce, and deals with them in the order of his title, but the latter subject takes up the greater part of the book, and is much the more fully treated. Not that any branch of the law is neglected, but some parts of it seem to us to be summed up too shortly, and not to give a practitioner consulting the work all the information he might desire on such subjects as jurisdiction, the effect of foreign divorces, and the consequences of the madness of either party. The practice portion is very complete, and as the book also contains the Statutes, Rules and Regulations, and a very complete set of forms, it is an invaluable guide to the practitioner.

**Third Edition.** *The Law relating to the Custody of Infants.* By LOUIS HOCHHEIMER. Baltimore. 1899.

This is an interesting little treatise, as it compares the law of England with that of the United States in a very instructive manner; the former is stated accurately, but, as might be expected, with much less detail than the latter. We must confess that the American Courts seem to have taken a broad view of the principles which should regulate the custody of infants, both earlier and more fully than ours. It is curious to note that some of the States, recognizing the precocity of the female sex, allow girls to attain their majority at the age of eighteen. The chapter on Juvenile Institutions is instructive, and the whole work will amply repay perusal.

**Third Edition.** *Steen's Mercantile Law.* By HERBERT JACOBS, B.A. London: Butterworth & Co. 1900.

This is a carefully-written little book, and accurate as far as it goes; but we see no reason for the production of a new edition so soon, unless it may be the very satisfactory one that the last edition is sold out. There have been no very important decisions on statutes since the last edition; but some of the subjects are treated of more fully, and we are glad to see that the statements as to Marine

Insurance are now supported by authorities, and not, as in the last edition, by the provisions of a Bill which has not yet become law.

**Third Edition.** *Interpleader in the High Court of Justice and in the County Courts* By MICHAEL CABABÉ. London Sweet & Maxwell. 1900.

There is but one book on Interpleader, and this edition is as accurate and careful as the former ones. It is probable that the bulk of Interpleader business is done in the County Courts, so that it was necessary to bring out this edition, to include the 157th section of the County Courts Act of 1888, and the County Court Rules of 1889. All the recent cases on the subject seem to have been noted.

**Fourth Edition.** *Action in Receivers* By PERCY I. WHELTER, M.A., B.C.L., assisted by CHARLES BURNBY, B.A. London Sweet & Maxwell, Limited. 1900.

The law of and practice as to receivers is both very technical and very important and as it is nine years since the last edition of Mr. Kerr's book came out, there have been many important decisions which have been carefully noted up in the present edition. The power of appointing a receiver in Lunacy cases has been considerably extended by section 116 of the Lunacy Act, 1890, and probably many orders are made thereunder. The present edition has had the great advantage of being revised by Master Burney, and his assistance makes it certain that the present practice at Chambers has been correctly stated. It has been and still is the book on the subject though it must be noticed that it is limited to Receivers appointed by the High Court, and does not deal with those appointed under the County Court Acts.

**Fifth Edition.** *Railways in Mines and Minerals* By ARCHIBALD BROWN. London. Butterworth & Co. 1900.

It is rather curious that no edition of this important work should have been published for more than twenty years. During that interval the law of the subject has been affected by numerous important decisions and much legislation. The very fundamental question of what are minerals has been discussed in two important cases in the House of Lords not very easily reconcilable, and the interesting subject, but unluckily one of not very much general importance, of Royal Mines has been decided in *Attorney-General v. Morgan*. Very many other branches of the subject have also had

judicial consideration during that period, and the result has necessarily been that the present edition has been largely re-written, and all the recent decisions included. As regards the effect of legislation also, when we remember that since the last edition among other Acts passed are the Settled Land Act, 1882; the Lunacy Act, 1890; the Trustee Act, 1893; the Coal Mines Regulation Act, 1887; the Quarries Act, 1894; and last, but not least, the Employers' Liability Act, 1880; and the Workmen's Compensation Act, 1897, it is easy to see how numerous the alterations and additions have been, and how heavy the labours of the editor in making the present edition a complete epitome, as far as space would permit, of the whole law of "mines and minerals." The very important questions of "Subsidence" and "Support" have been fully treated. There are two other features which deserve special notice. One is the glossary of English mining terms, and the other the very valuable collection of mining precedents. All through the work special care has been devoted to what may be called the conveyancing of the subject, and we think that even more precedents might have been given with advantage. We find in more than one place that, after a reference to the care with which provision should be made for a certain state of circumstances, we have not been able to find a precedent for the condition, etc., suggested. Of course space is a very serious consideration, but in a book on a special subject one hopes to find a large number of special clauses, etc., which are not to be found elsewhere in general works on conveyancing.

**Fifth Edition.** *Elphinstone's Introduction to Conveyancing.* By SIR HOWARD WAKELTON ELPHINSTONE, BART., M.A., JAMES W. CLARK, M.A., and ARTHUR DICKSON, LL.B. London: Sweet & Maxwell, Limited. 1900.

Another edition of this excellent work is most welcome, and has been rendered imperative by the passing of the Land Transfer Act, 1897. The clearness of its style, and its combination of legal accuracy with practical common sense and "sweet reasonableness," render it invaluable as an introduction to the difficult science of conveyancing. By its references to the two other well-known conveyancing works for which its authors are responsible, it illustrates, in a complete and satisfactory manner, the maxims it inculcates. The chapter on Wills strikes us as particularly interesting and instructive. Although the work is, we suppose, primarily intended for students and young practitioners, there can be but few of the most advanced conveyancers who would not find reference to its pages useful.

**Sixth Edition.** *A Digest of the Law of Easements.* By L. C. INNES. London: Stevens & Sons, Limited. 1900.

Mr. Innes has reduced the Law of Easements to about a hundred and sixty propositions with appropriate illustrations. The work was originally undertaken "as a preliminary step towards the preparation of a Chapter of the Indian Code on the same subject." The propositions are clearly, and, as far as we have been able to judge, correctly laid down, and the authorities and illustrations have been well selected. It is undoubtedly an able *résumé* of the main principles of the law, and should prove useful either to the student or the practitioner, and perhaps not least to the draftsmen of a future code.

**Seventh Edition.** *Shaw's Manual of the Vaccination Law.* London: Butterworth & Co. 1899.

There are two very good reasons for the issue of this useful little work, although the last edition was published as lately as 1898. In the first place the sixth edition is out of print, and in the second place new and important orders, circulars, and memoranda have been issued since the Act of 1898, which it is absolutely necessary to include in any book on the subject. This has been done in this edition, the work has been revised, and the recent cases included. A full report is also given of the very important case of *Bramble v. Low*; and the work seems to be invaluable to all those who are charged with the duties connected with the Vaccination Acts.

**Eighth Edition.** *Company Precedents. Part II. Winding-Up. Forms and Practice.* By FRANCIS BEAUFORT PALMER. Assisted by FRANK EVANS. Part III. *Debentures and Debenture Stock.* By FRANCIS BEAUFORT PALMER. London: Stevens & Sons. 1900.

**Second Edition.** *Concise Precedents under the Companies Acts.* By F. GORE-BROWNE, M.A. London: Jordan & Sons, Limited. 1900.

New editions of Mr. Palmer's invaluable work come in quick succession, and now the various parts are in a rather curious position. Part I. is still in the seventh edition; Part II. is in the eighth edition; and Part III., which is concerned with debentures, and was formerly included in Part II., is also described as being in the eighth edition. However, it does not much matter what the edition is called, as long as it contains the most recent information and law, and that these volumes certainly do, as Part III. contains the alteration of practice in debenture actions agreed on by the Judges of the Chancery Division, and announced as recently as

the 7th of March. With the great increase of company business has come an increased number of cases involving new and difficult principles; and the result has been a large addition to the numbers of the precedents in both volumes, and a large amount of labour expended in recasting and rewriting the numerous and instructive notes. One of the most valuable features of the work is the fact that a large number of the precedents and forms are taken from actual Judgments and Orders of the Court, and thereby possess an authority which no draftsman, however eminent, could alone command. Another is the large amount of useful information obtained from official sources, and not easily to be obtained elsewhere. When Mr. Palmer does not approve of a decision he does not hesitate to say so, and to express his hope that the rule laid down may be disregarded, as in the case of the rule laid down in *Herbert Standring & Co.* A very useful addition to Part II. is the Companies Act, 1878 (drafted by the author), with forms and valuable notes. A good deal of learning and argument, which was in the earlier edition devoted to the question of the negotiability of debentures to bearer, has been rendered unnecessary by the recent decision of Kennedy, J., in *Bechuanaland Exploration Co. v. London Trading Bank*, with which decision the learned author cordially agrees. In some places there is rather a waste of space by the statements of law in the earlier chapters being reproduced almost verbatim as notes to the precedents; but this is probably done for convenience of reference. It is rather unfortunate that the perfection of Part III. is somewhat marred by an unusual number of misprints, such as *refuted*, instead of *reputed*, ownership, on p. 167; and it requires a moment's reflection to discover that *omnia rite acta esse*, on p. 103, is meant for *omnia rite acta esse*; but, of course, these slips in no way detract from the real merits of the work, which cannot well be exaggerated. We might call attention to the suggestion made as to the possibility of excluding the operation of the Directors Liability Act, 1890, by means of a waiver clause in the prospectus. The suggestion is supported by an ingenious argument, but we cannot help having considerable doubt as to whether the Courts would allow such an attempt to succeed.

Mr. Gore-Browne's work, too, shows a great increase in bulk. From a handy little crown octavo it has grown to a large demy octavo, from about five hundred and fifty pages to over one thousand, and the number of forms given has increased from three hundred and thirty-one to six hundred and thirty-one. The value of so large a number of concise precedents, selected and drafted by so skilful and experienced a lawyer, may easily be conceived, and the notes, which

are also concise, strike us as very good, and cover almost the whole range of questions which are likely to arise in "conducting the affairs of a company." Mr. Gore-Browne's aim has been to produce not an exhaustive, but a thoroughly practical work, and it possesses the great advantage for reference of being all in one volume. The Forms of Rules of Clubs, though not strictly concerning companies, may prove useful.

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**Ninth Edition.** *Principles of the English Law of Contract.* By SIR WILLIAM R. ANSON, BART., D.C.L. Oxford: The Clarendon Press. 1899.

It is satisfactory to see that Sir William Anson's new duties have not prevented him from bringing out, with the assistance of Mr. W. M. Harrison, another edition of his well-known work. It is deservedly one of the best known and most widely read of the elementary textbooks on this subject; in fact, its clear grasp of principle makes it useful to many who would not call themselves "students" in the ordinary sense. No very new principles of contract are likely to be started nowadays, but many doubtful points get settled, and there are always some cases to be noted up. Some useful rules as to procedure have been added for the assistance of students.

**Fifteenth Edition.** *Smith's Manual of Equity.* By E. WILLIAMS. London: Stevens & Sons, Limited. 1900.

When a work has reached its fifteenth edition, it is pretty clear that it is one of considerable value, and the principal object of examining a new edition is to see what changes or additions have been made in it. In this instance a number of important Acts have been passed since the issue of the last edition, including the Partnership Act, 1890, the Trustee Acts, 1893 and 1894, and the Land Transfer Act, 1897; there have also been many decisions on the subjects treated of. All the most important of these seem to have been considered and referred to and commented on, and the book continues to fulfil, in a satisfactory manner, the purpose for which it was originally intended, namely, "to give a succinct yet comprehensive view of the leading principles of Equity Jurisprudence."

**Sixteenth Edition.** *Byles on Bills.* By MAURICE BARNARD BYLES and WALTER JOHN BARNARD BYLES. London: Sweet and Maxwell, Limited. 1899.

*Byles on Bills* is in some ways unique. It possesses one of the best alliterative titles, it has for over fifty years been the standard

work on the subject of which it treats, and it is still associated with the family of the original author. The present edition does not present any very new features, nor are there many important new cases to comment on, the most important being probably the cases of *Scholfield v. Londesborough* and *Clutton v. Attenboro*; but this is not the fault of the editors, who have noted all there are. The paucity of new cases is probably a tribute to the success of the very able codification of the law relating to Bills of Exchange, Cheques, and Promissory Notes, effected by the Bills of Exchange Act, 1882. What have to be noted up in each new edition and may possibly continue to require such attention for some time, are Acts imposing increased Stamp Duties. The Finance Act of 1899 became law too late to be included in the body of the work, but is noticed in the preface. We have come across a few misprints, and on p. 177, note (r), the wrong section of the code is referred to.

**Twenty-second Edition.** *Archbold's Pleading, Evidence, and Practice in Criminal Cases.* The twenty-second edition by WILLIAM FEILDEN CRAIES, M.A., and GUY STEPHENSON, M.A. London: Sweet & Maxwell, Limited. 1900.

Seventy-eight years ago John Frederick Archbold first gave to the world his book *Pleading and Evidence in Criminal Cases*, and from that time to this the importance in practice of this comparatively small work has been ever on the increase. Great lawyers have from time to time brought the volume up to date. Jervis, the Chief Justice of the Common Pleas; Welshy, the celebrated partner of Meeson in the best reports of the most learned Court which ever sat; and Bruce, the late stipendiary magistrate at Leeds. And the book so edited has become almost the law itself.

There are many criminal advocates in large practice who in reality know no law but that of *Archbold*. Any cases not cited in this book might for them just as well have never been decided.

Many a man's liberty or life has hung in the balance, only until there has been time to turn the pages of *Archbold* over to discover what the law applicable to his case might be.

As to the "practice of the Court," most tribunals never even question this authority. The *practice* lies in the great *practice-book*. No attempt by any Court to alter the practice will be completely successful, until it is recorded here.

The indictments which grand juries have before them are but so many adaptations of the precedents given in *Archbold*. And very few are the lawyers who in ordinary cases look at all beyond its covers.



A very heavy responsibility therefore rests upon those who have the editing of such a book. Much is heard about "judge-made law:" but the gentlemen to whom the publishers of any great standard text-book may happen to entrust the care of a new edition are no less surely "makers of law."

In the case of *Archbold* this is more than usually true: and for this reason, criminal law is administered for the most part in the country. It is administered by many persons who do not even pretend to call themselves lawyers. It is administered far from libraries; and by many who never read the Old Bailey trials, or read them only casually. In such cases *what the book says* is conclusive.

It is only the minority of prisoners who are defended; and there is no appeal. The two methods which do exist of setting mistakes right are the Writ of Error and the Case stated for the consideration of the Court for Crown Cases Reserved. Now, it is obvious that in the case of undefended prisoners neither of these methods is of any practical importance, in an instance where the judge does not himself doubt the correctness of his decision.

If *Archbold* is clearly in favour of his decision, it is probable that it will never occur to him to doubt it. If *Archbold* has made a slip (and we shall show presently that the thing is possible), or has inadequately recorded the effect of a particular decision, or has omitted a reference to a relevant statute, a wrong decision, whenever the point may arise, will be the most probable result.

Great power is therefore given into the hands of the editors. And it is almost inevitable that it should be so. There are about six thousand cases cited in *Archbold*, and there is also an enormous number of extracts from statutes. And there are many points in the criminal law which depend on no statute or decided case at all. The *Pleas of the Crown* of Hawkins, and Hale, and East; the *Discourses on Crown Law* of Sir Michael Foster; Bacon's *Abridgment*, and Coke's *Institutes*, must all be consulted from time to time in order to reach the principles of the Criminal Law.

It is impossible to have all these volumes at hand on circuit, and *à fortiori* impossible at Quarter or Petty Sessions. It is impracticable to adjourn each case where a doubt arises until time can be found to consult the original authority. Without the labours of the writers of text-books, justice according to law could never be obtained in every town and village of the country as approximately as is the case to-day. For justice according to *Archbold* is upon the whole a very near approximation to justice according to law.

Of course it is the duty of counsel, when they have the opportunity, to probe the matter deeper. It is not enough to consult *Archbold*

when the brief has been received in London several days before the trial. In such a case, if there is the least doubt on any point, the authorities referred to in the book ought to be carefully read and scrutinized, and *Russell on Crimes*, or *Mew's Criminal Digest*, explored on the chance of finding others.

But it is well known, if not to the general public, at least to the professional circle who are concerned with the matter, that briefs are *not* given in London, and *not* served days or even hours before: and the story is told of a late learned leader, who used when a junior at Sessions to open his case thus: "Gentlemen of the Jury. These depositions have only just come into my hands. I know no more of the case than you do yourselves. But, with the leave of the Bench, we will now proceed to investigate it together!"

The practice of briefing counsel at the last moment is, in all cases where it can be avoided, most reprehensible; but in the case of large criminal Sessions we suppose that it cannot be helped. But how is it possible for counsel in such a case to consult original authorities or to verify the accuracy of his *Archbold*? He can only do what thousands of advocates have done before him: bow down before the authority of this book, and take the law and the practice alike from it. In what better position is the judge? If he knows the law or the practice on the particular point already, there is of course no difficulty; but if not, he is forced to submit to the same despotic influence.

How, then, does the system work? What is "justice according to *Archbold*?" It has given satisfaction for seventy-eight years? Will it give satisfaction still?

We think that upon the whole it will. It was full time for the appearance of the new edition. In any case the seven years which have elapsed since the appearance of the last edition was a long while for those who knew no law but *Archbold* to remain in ignorance of the alterations in the law. But, moreover, during these particular seven years, one event has occurred—the passing of the Criminal Evidence Act—which has revolutionized the whole procedure of criminal justice. Accused persons had never been examined on oath before, except in certain specified cases, since the days of the Star Chamber. Whole pages, therefore, of the old *Archbold* became waste paper since the new statute received the Royal Assent.

The present editors have filled their place with most useful pages on the present practice. The Criminal Evidence Act, 1898, was obscure in many particulars. There was a number of prior Acts which it did not expressly repeal, but which by implication could no longer stand. Many questions have arisen in consequence; and some important decisions have been given. The result is shown

on pages 365 and following of the new edition of *Archbold*; and the result so given will thereby become "the practice."

There have been several decisions at *nisi prius* on what is meant by "involving imputations on the character of the prosecutor or his witnesses." These cases, and the books in which they will be found, are carefully noted.

Perhaps the most serious responsibility of all rests upon an editor of a text-book when he deals with "Judgments and Punishments."

"What can I give him?" is a question which the Court frequently answers once more by reference to this book. A mistake in this matter would be the most serious mistake of all. But we can find none. The Prison Act of 1898 (Statute 61 & 62 Vict. c. 41) is one which it is most important for all tribunals to know and appreciate. To make the punishment not only "fit the crime," but to "fit the criminal too," the Court must know the extreme limits of its power and every gradation within those limits. By section 6, sub-section 1, of the new Act "prisoners convicted of offences either on indictment or otherwise, and not sentenced to penal servitude or hard labour, shall be divided into three divisions," and by section 2, "If no direction is given by the Court the offender shall, subject to the provisions of this section, be treated as a prisoner of the third division." The new *Archbold* gives these sections and references to the Local Prison Rules, 1899, in whose light their importance will be appreciated.

The work done by the new editors must have been extremely laborious, and upon the whole it is well done: but it is not perfect. For instance, one of the most important cases which has been decided by the Court for the consideration of Crown Cases Reserved since the last edition is *Reg. v. Lillyman* [1896] 2 Q. B. 167, as to evidence of complaints in cases of rape.

Now, on page 292 of the new edition we read—

"and upon the same principle, the declarations of a person robbed, or a woman ravished, as to the facts made immediately afterwards, are evidence not of the facts complained of, but of the consistency of the conduct of the complainant with his testimony at the trial, though the *particulars* of their statement cannot be inquired into. See *Reg. v. Lillyman* [1896], 1 Q. B. 167, 65 L.J. M.C. 13."

The editors have made a slip here, as they have quoted the wrong volume. It should be [1896] 2 Q. B. But that is not the important matter. The Court really decided that in a case of rape the *particulars* of the complaint *can* be inquired into: and that is the whole point of the decision. See *per Sir Henry Hawkins*, at p. 179. There is danger that this may lead to the exclusion of admissible evidence on some occasion.

It is fair, however, to point out that on page 867 the editors have stated the law and the reference correctly ; but they there refer back to page 287, which page when consulted throws no light upon the matter, page 292 having evidently been meant.

Now, this slip is important, as illustrating the serious influence which one book may exercise. Hundreds of persons will read page 292 of *Archbold* for one that reads the full report of *Reg. v. Lillyman*. Then it is not unlikely that justice according to law may some day be superseded by a quite different "justice according to *Archbold*." And of course there may be other instances : for when we have once seen the good Homer nod, we are inclined to suspect his general infallibility.

Such a book ought, therefore, to be checked in every possible way. We do not believe that the editors would be otherwise than grateful if any inaccuracy can be pointed out to them : for they may remedy it in another edition. Every person who discovers a mistake in such a book renders a public service in the administration of the criminal law of the land. There are other books taken on circuit besides *Archbold*—such as Roscoe's *Criminal Evidence*, and the works of the late Sir James Fitzjames Stephen. One should be checked with the other. There are always many of the unemployed bar sitting in Court at the Assizes, and whenever a statement of the law is read from one of the standard text books, which is in any way open to doubt, it would be a useful exercise for the wits of these compulsorily idle ones to check the statement by comparing the corresponding pages of one of the rival books. But even this method is not absolutely sure of success : for the mistake of two books will often be found to have a common origin.

"Melius est petere fontes quam sectari rivulos;" but that is no reason against making every possible effort for the purification of the streams.

**Thirty-second Edition.** *Stone's Justice's Manual.* By GEORGE B. KENNETH. London : Shaw & Sons. 1900.

**Fifth Edition.** *The Magistrates' Annual Practice, 1900.* By CHARLES MUNIER ATKINSON, M.A., LL.M. London : Stevens & Sons, Limited.

**Seventh Edition.** *The Justice's Note-Book.* By HENRY WARBURTON and LEONARD W. KIRSHAM, B.A. London : Stevens & Sons, Limited. 1900.

Every year some new addition is made to the duties and responsibilities of Magistrates, and they are given more and often new work

to do, both judicial and administrative. It would be impossible for them, even with the assistance of their, as a rule very competent, clerks, to get through their labours with credit to themselves and advantage to the public, without some really good book to refer to. Of these luckily there is no lack, and in their different ways each of the three works before us are likely to be of great use. The *Justice's Note-book* does not pretend to be more than its title signifies, and is written in a much more lively and popular style, than the other two treatises, but gives a short and clear account of the great majority of questions that are likely to arise. It is very portable, is arranged in alphabetical order and has a good index, but does not contain tables of the cases and statutes cited. Mr. Atkinson's work is much more complete, and there is very little that is likely to arise before a Justice of the Peace on which he will not find accurate and sufficient information therein. The book has been kept a convenient size, and is at the same time in good clear type. This has been attained by judicious compression, and by not dealing in any detail with certain lengthy subjects, such as the Merchant Shipping Acts, and the Factory Acts. A few subjects we note have been omitted, such as Blasphemy and Offences by Companies, and we think the case of *R. v. Shipley, P.C.*, ought to have been cited under Highway. The subject of Betting has been very carefully considered in the light of *Powell v. Kempton Park Race-course Co.*, and if the present state of the law is not quite clear, it is not the fault of Mr. Atkinson.

*Stone's Justices' Manual* is an exhaustive work, and whenever we open it we are filled with admiration for the immense labour, care, and ability that have been expended on it. It contains apparently information on every point that is covered either by Legislation, Judicial Decisions, or Practice, and must be simply invaluable. We do not think that the opinion expressed that the husband or wife who is a competent witness under the Criminal Evidence Act is not also *compellable*, is correct, and prefer Mr. Atkinson's opinion. In spite of the case of *R. v. Brazil*, the practice has been the other way, but it has not been authoritatively decided.

**Thirty-seventh Edition.** *Every Man's Own Lawyer.* London: Crosby Lockwood & Son. 1900.

This well-known and popular work has been revised and brought up to date, and now includes the most recent legislation and cases. It is wonderfully accurate for its great compass, but stipendiary magistrates are appointed by the Home Secretary, not by the Lord Chancellor, and the important provisions of the Summary Jurisdiction

Act, 1899, extending the powers of the Court over both young persons and adults under certain circumstances, should have been included. The fact that a book has reached its thirty-seventh edition is a proof that it supplies a want felt by some section of the public, but we do not think that section includes professional lawyers.

## CONTEMPORARY FOREIGN LITERATURE.

### PERIODICALS.

*Criminalogia Moderna.* (1899, 1900. Nos. 11-15.) Buenos Aires.

This review dealing with criminal law and practice is permeated with the psychological influence of Lombroso and his followers. The South American Republics analyze crime instead of repressing it. One wonders what the practical good sense of a Bramwell or a Hawkins would have said to some of the views enunciated in these pages, for instance, to the definition of a criminal not as one who does something wrong, but as one who is deficient in certain necessary sentiments. The only collaborators from English-speaking countries are Dr. Alderman, of Melbourne, and Dr. Steevens, of Boston. A *Referendum Juridico* set on foot by the editors is noticeable as showing the questions which they regard as of most pressing importance in Argentina. The prominent ones are whether the country is ripe for trial by jury, and whether proceedings should ever be *in camera*. To these questions the answer is promised in a future number after the close of the referendum. The interest taken in criminal law in South America is shown by the projected congress of jurists to be held at Rio on the 3rd of May, in celebration of the fourth centenary of the discovery of Brazil. English lawyers will wish them every success. The suitability of the Spanish language for legal expression is shown by several terms and phrases in the articles of these numbers; *dismaternidad* is a good example. An Englishman would have to use several words in order to translate this expressive word.

*Deutsche Juristen-Zeitung.* Bi-Monthly. 1 Jan.-1 Apr. 1900. Berlin.

Like other German legal periodicals this is full of the new Code, and even the advertisements are of little else than editions and commentaries on the whole or parts of it. Herr Ernst von Wildenbruch even breaks into song over it, and his verses on *Das deutsche Recht* are by no means unpoetical, the subject considered.

*O Deutschland, Du in Kampf vereint und Schlacht,  
Und nun geint durch Rechtes Friedensmacht.*

An article on juristic mathematics is hardly convincing. The case of division of the estate of a deceased testator is taken, and the share of one of the sons is represented by the complicated formula—

$$n - \frac{n}{4} + 1 + 2^1 \\ 2 \quad - - 1^1$$

*La Gazzetta Penale.* Weekly. 5 December, 1899—19 March, 1900. Rome

Some of the reported decisions are interesting as being characteristic of the country. Poverty is indicated by numerous decisions on *dazio consumo*, or tolls on commodities. The *tolleth dannosi* of Dante are by no means extinct in modern Italy. The courts appear to have been occupied more than once with the curious offence of *pascolo abusivo*, or pasture by trespass, a crime apparently only in the island of Sardinia. Decisions which could hardly have been given in England are those that a *parti civile* may be condemned in costs, and that in a charge of corrupting a juror it is unnecessary to prove that the juror voted in accordance with the views of the corrupter.

*Revue Generale.* (January—March, 1900.) Brussels

*Revue Bibliographique Belge.* (November, 1899—February, 1900.) Brussels.

These reviews contain a few notices of foreign law-books of little interest to an English lawyer, with perhaps one exception. This is a book by Mijnheer De Haan, published at Amsterdam under the name of *Loose Schutsen over het Notariat in de L. A. Republiek*. From this we learn that the Transvaal notary is always a Hollander, and that notarial business is so scanty that every notary is something else as well. This duplication of duties is, however, not peculiar to the South African Republic.

*Journal du Droit International Privé.* (1899 Nos. XI. and XII.) Paris

The case of the greatest interest to English lawyers is that of *Major Spilsbury*, reported at considerable length. In *Société de Sombreffe v. Henderson and Greenwood* the Cour d'Appel of Liège held that a judgment of the High Court of Justice in England in the nature of a simple *exequatur* of a Belgian judgment had no legal effect beyond England. One of the features of this valuable periodical is the annual bibliography of works on international law. For 1899 it is as good and complete as ever.

*Rivista Politica e Letteraria.* January-March, 1900. Rome.

In an article on the South African War (*Anglo-Boera* is the Italian phrase), an anonymous writer takes a view differing from that of most Continental jurists. England is fighting for justice and equality, and will win, and so become a great military power. Accordingly her alliance will be all the more valuable for Italy. On account of their concurrent interests in the Mediterranean, such an alliance, says another anonymous writer, is inevitable.

*Kosmodike.* December, 1899—March, 1900. Berlin.

An interesting feature is a reprint of Gambetta's earliest forensic speech, a characteristic defence before a police magistrate at Paris in 1862. There are several articles by Englishmen, His Honour Judge Raikes writes on the Buffalo Conference, and Mr. C. M. Atkinson on the procedure in Police Courts. There is also a review of Professor Westlake's lecture on the Transvaal War.

JAMES WILLIAMS.

## SOME WORKS OF REFERENCE.

*The Literary Year-Book and Librarian's Directory.* Edited by HERBERT MORRAH. London: George Allen. 1900. The present issue contains a large amount of material gathered from various sources, and arranged in a form differing in many essential respects from the volumes which have preceded it. The first part of the work is a general record of the literary work of the year 1899. The Editor points out that on y one section of this part is critical, and that objection has been raised to the inclusion of any matter of a critical nature in a book which contains statistical details. On the other hand, there are those who think it reasonable that a book of this kind should deal with literature in an intelligent spirit. The answer to the question thus raised, naively remarks the Editor, is given by those who are particularly well qualified to speak for themselves, and he refers his readers to what is actually written in the book on the subject.

The second part is alphabetically arranged, and a large amount of information added to every section, making the book a most valuable work of reference to every one engaged or interested in literary pursuits. The previous Editor, Mr. Joseph Jacobs, having surrendered the general supervision of the book owing to the pressure of important work, his mantle has descended on Mr. Morrah, who as time goes on, and with the assistance of all concerned with books, hopes to make the Year-Book grow until at length the whole of the wide literary field shall be covered. To be useful, however, the book must be accurate as well as comprehensive, and we take this opportunity of pointing out to the Editor that a list of legal publications, such as that to be found on page 338, is distinctly misleading and incomplete without the name of the magazine, which is at once the leading and the oldest journal of jurisprudence in existence.

*The "Shipping World" Year-Book, 1900.* Edited by MAJOR JONES. London: "Shipping World" Office. Pp. 1184. (Price 5s.)—Several new and important features have been included in the present volume, among which may be noted



the rules governing the loading of turret-deck vessels, the medical scale adopted by the Board of Trade for merchant and passenger ships, the output of the world's shipyards during 1899, and digests of recent Merchant Shipping Acts.

The Board of Trade regulations for Preventing Collisions at Sea, the Carriage of Grain Act, the Surrender of Deserters Abroad, and all other important regulations affecting shipping, are included in this edition, and the Tariffs of all Nations and the Port and Harbour Directories have been revised right up to the hour of printing. The map, by Mr. J. G. Bartholomew, accompanying the book has been enlarged and still further improved. The work is undoubtedly the handiest book of reference on shipping matters, and is indispensable to those interested in commerce, navigation, and maritime law.

*Debrett's House of Commons and the Judicial Bench.* 1900. London: Dean & Son, Ltd. This volume, the 34th annual, is in every way an admirable work. In the Parliamentary section, biographies of all members are given. Results of polling at the last two General Elections, an abridged Peerage, a list of Privy Councillors, and an explanation of Technical Parliamentary Expressions, are also included in this section, as well as much other information useful to the politician. In the judicial section of the work are now included particulars of the Judges of the Superior and County Courts of the United Kingdom, Recorders, Metropolitan and Stipendiary Magistrates, etc.

*The Newspaper Press Directory and Advertisers' Guide*, 1900 (55th year). London: C. Mitchell & Co.—In this volume, journalists, advertisers, and all who are engaged in literary work will find the latest reliable information concerning the Press in all parts of the world. All the matter is thoroughly up to date, and the work is certainly to be considered as the standard book of reference with respect to the newspaper press.

Received too late for notice in this issue: —*Russell on Arbitration* (Stevens & Sons, Ltd.); *The Law of Animals*, by JOHN H. INGHAM (T. & J. W. Johnson & Co., Philadelphia); *SHURLEY'S Leading Cases in Common Law*, by RICHARD WATSON, LL.B. (Stevens & Sons, Ltd.); *The Law of Bailments*, by E. BEAL, B.A. (Butterworth & Co.).

Other publications received: —*Bentham and the Colliers* (Harvard Law Review); *Appendix to Privy Council Practice*; *English Common Law in Early American Colonies* (University of Wisconsin); *La Revue Légale*; *State Library Bulletin* (University of New York); *Report of the 22nd Annual Meeting of the American Bar Association*; *Notes on the Law of Territorial Expansion*; *The Humane Review*; *Report of the London Conference, 1899, on Shipowner's Liability*.

The *Law Magazine and Review* receives or exchanges with the following amongst other publications: —*Review of Reviews*, *Juridical Review*, *Public Opinion*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Accountants' Journal*, *North American Review*, *Canada Law Journal*, *Chicago Legal News*, *American Law Review*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Virginia Law Register*, *American Lawyer*, *Albany Law Journal*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Queensland Law Journal*, *Law Students' Journal*, *Westminster Review*, *Concord*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer*.

# THE LAW MAGAZINE AND REVIEW.

No. CCCXVII.—AUGUST, 1900.

## I.—SOLICITORS AND REFORM.

I HAVE been asked to express my views on the subject of those reforms which are necessary for the advantage of the solicitors' branch of the legal profession. At the head of them all I would place the alteration of the bye-laws of the Incorporated Law Society in such a way as to enable any fairly strong minority of the members to elect their own candidate on the Council. This should be done by means of a cumulative vote. Each member of the Society ought to be allowed to have as many votes as there are members for election, and to bestow the whole of these votes on one candidate, or distribute them among the candidates in such manner as he desires. The immediate result of this reform would be to break up what is known as the "Lincoln's Inn Ring," that close clique which the late chairman of the Discipline Committee, and one of the most notable members of it, once, I believe, described as the "Bond of Brotherhood." When the members at large are fairly represented on the Council, and the present system which practically amounts to the election of the nominees of the clique is done away with, reforms will be immediately easy and possible.

Much point has been made lately of the fact that only

about half the members of the profession belong to the Incorporated Law Society, and it has been suggested in many quarters that every solicitor should be compelled to be a member. To an arrangement of this kind there is one objection of so serious a character that I think that it is fatal to the scheme—if all solicitors were compelled to belong to the Incorporated Law Society, that Society would have to be deprived of the power of expelling any member, otherwise the expulsion of any member would be equivalent to striking him off the rolls. The whole of the disciplinary powers over solicitors ought to be in the hands of the Court of which they are officers, and the mischievous and even disastrous results which have followed the establishment of the so-called Discipline Committee show of what abuse such powers are capable and how mischievous is the establishment of a secret tribunal.

It is many years since I first proposed that all solicitors should give security in a sum of at least £5,000. To this it is objected that such a sum would be but a drop in the ocean in regard to some of the more serious failures which have recently occurred, but I do not think that this is true. If any person or corporation were responsible for the honesty of a solicitor in the sum of £5,000, they would be apt to keep their eyes open, and the moment that anything unsatisfactory transpired in regard to the solicitor, matters would probably be immediately brought to a crisis instead of his financial position continuing, as has been the case in several of the recent heavy failures, an open secret in the profession, but entirely unknown to the general body of his clients. Another objection that has been made is that some young men would not be able to find security to this amount, but there are professions other than that of a solicitor which are open to them, and it is not desirable to encourage the advent into our profession of impecunious young men without resources or connections.

As to the proposed scheme for the auditing of solicitors' accounts, I believe it to be wholly impracticable. An act of Parliament might be passed requiring all solicitors to keep their accounts in certain prescribed forms and making failure to do this a misdemeanour, but no system of audit in the world could possibly discover such transactions as that which occurred a little while ago, where a sum of £40,000 was paid to a solicitor and immediately misappropriated. Whether that sum was ever entered in his books or not I do not know, but it is manifest that it would not have been had any form of audit been in force. Moreover there is another great objection, and it is this. Frequently (and generally in matters connected with ladies or illegitimate children) payments have to be made of the most private nature, and it would be wholly out of the question that entries relating to such payments should be produced for inspection to an accountant's clerk.

The present method of payment of solicitors must be altered in the near future. The ridiculous incompetence of the Council of the Incorporated Law Society has allowed the profession to be tied to a scheme of charges in conveyancing matters which amount to only a fraction of the charges which house agents are able to recover as customary in the Courts of Law. These men are not professional men at all, anyone can take out a license to carry on their business, and yet they are allowed to charge for identical work many times the amount which a solicitor who has been trained at a great expenditure of time and money can ask for. This one thing by itself is sufficient to utterly condemn the Council of the Incorporated Law Society. As a body, it does no real good to those whose money it takes and whose interests it is supposed to safeguard. The principle, moreover, of payment by lump sums for certain business instead of by petty little additions of 3s. 6d. for letters and 10s. for attendances ought to

be insisted on. Under the system which exists at present (in everything except conveyancing and cases in the Commercial Courts) the knave and the fool often make much more money out of a business than a capable and honest man can make in the same matter.

The existing method of carrying on Chancery business also calls loudly for reform. In taking accounts or doing other detailed business in chambers before the Masters of the Chancery Division the practice is to take an appointment, generally a fortnight or three weeks off, for one or two hours. At the end of the appointment the business is proceeded with no further, and the next vacant appointment, again at an interval of a fortnight or three weeks, is given to the solicitors concerned, and in this way work which could be finished in two days goes on for months to the loss and vexation of the client. One or two more Masters in Chancery may perhaps be necessary, but it is absolutely essential to the proper carrying on of the work that appointments of this kind should be proceeded with *de die in diem* until the business is completed.

To conclude as I began, the one great reform which is needed is the alteration of the existing system of voting for the Council. The present Council have shown themselves to be hopelessly incompetent. There have been more cases than one of dishonesty among members of the Council in the last twenty years. We ought to make a clean sweep of the present Council, and then reforms will be speedily put forward and duly carried.

A. H. HASTIE.

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## II.—NOTES ON THE EARLY HISTORY OF LEGAL STUDIES IN ENGLAND.\*

*(Continued from page 173)*

WITH the assistance of Sir Nicholas Bacon and the Black Books of Lincoln's Inn I have endeavoured to present a picture of the Inns of Court at the close of the reign of Henry VIII. Together with the nine Inns of Chancery, the four Inns of Court formed, as Stow says, a whole university as it were of students, practisers, pleaders, and judges of the laws of the realm, not living of common stipends, as in other universities it was for the most part done, but of their own private maintenance, as being altogether fed either by their places or practice or otherwise by their proper revenues or exhibition of parents or friends. The Inns of Court were, he says, replenished partly with young students and partly with graduates and practisers of the law; but the Inns of Chancery, being provinces subjected to the Inns of Court, were chiefly filled with officers, attorneys, solicitors and clerks that followed the Courts of King's Bench and Common Pleas; yet they wanted not some others, being young students that came thither from one of the universities or sometimes immediately from grammar schools; and these having performed the exercises of their own houses, bolts, moots, and putting of cases, proceeded to be admitted as fellows of some of the four Inns of Court, where continuing for the space of seven years or thereabouts, they frequented readings, mootings, boltings, and other learned exercises, whereby growing ripe in the knowledge of the laws and approved withal to be of honest conversation, they were called to the degree of Utter Barristers and so

\* A paper read by Joseph Walton, Esq., Q.C., before the American Bar Association, at Buffalo, N Y, August 29th, 1899, revised and amplified.

enabled to practise the law both in their chambers and at the bar. There were, according to Stow, reckoned to be at the four Inns of Court about 300 students, besides the Utter and Inner barristers. The readers, then the principal officers of the Inns, were persons of great consequence. During the readings, which continued for three weeks and three days in each of the learning vacations, Lent and Autumn, the Reader kept a constant and splendid table, feasting the nobility, judges, bishops, principal officers of State, and sometimes the King himself. In fine, these Inns of Court and Chancery are said to have made "the most famous profession of the law that is in the world; there being so many eminent persons of such sound judgment in the knowledge of the law, and a considerable number of them the sons of gentlemen and persons of quality." This description is perhaps somewhat highly coloured. The learning was obscure and highly technical, possessing little interest save for professional purposes. But it had the high merit of being essentially practical. All the great lawyers, Lyttelton, More, Bacon, Coke, and the rest had learned their business at the Inns of Court, and in due course had taken their share diligently and usefully in the work of teaching at the exercises and readings. In the days when printed books did not exist or were not easily accessible, a more perfect scheme for maintaining the knowledge and promoting the study of the Bar could scarcely have been devised. It is said that the Year Book of Henry VI. was printed in 1480 and Lyttelton's Tenures in 1481. As early as 1475 the library is mentioned in the Black Book of Lincoln's Inn. About 1505 John Nethersale, a Fellow of the Society, left forty marks that the Society might newly erect the library within the Inn to the increase of learning and the study of the law of England within the Inn; and upon the condi-

tion that the Chaplain of the Inn should celebrate every Friday for ever a *Requiem* Mass for the soul of the said John Nethersale and before the *lavabo* at every such Mass should say the Psalm *De Profundis* for the repose of his soul. Books accumulated by purchase and gift. In 1566 a sum of 53s. 4d. is paid to one of the butlers for writing a catalogue of the books. But it is not until the beginning of the next century that we find entries indicating that the Library is becoming a place of general resort for the purpose of study and work. At a Council held in November 1629, a petition from the barristers and students of Lincoln's Inn, touching the Library, is read, in which they offer, after convenient seats and presses both for books and study shall have been framed and set up, to contribute books towards the furnishing of the Library, and such annual stipend towards the keeping of it as to the Masters of the Bench may seem most meet. This offer, which is said to have been taken in good part by the Benchers, is referred by them to a committee for consideration; and in the January of the following year, 1630, it is ordered by the Bench that a Common Library shall be made for the use of the Society, and a committee of Benchers and Barristers is desired to arrange for carrying out the work, and also to consider what orders shall be fit to be observed in the Library after the same shall be finished and furnished. About a year later, on the 3rd February, 1631, it is ordered that the Library shall now be opened to the gentlemen of the Society who are to have their admittance according to the Orders of the Library.

The printing presses were busy. They were multiplying copies of the Year Books, of the reports of Dyer and Plowden and Coke, of treatises, such as Lyttelton's *Tenures*, Fitzherbert's *Abridgement*, the *Doctor and Student*, Perkyn's *Profitable Book*, Rastell's *Abridge-*



ment and the like, works which dealt not very much with abstract principles or theories of jurisprudence, but set forth and explained those rules of practical law with which the barrister had to make himself familiar if he was to practise his profession with success. There is no doubt the printed book, soon after the middle of the 16th century, began to supersede the old system of oral teaching. The interest in Readings and Mootings naturally flagged. The Records show the increasing difficulty of maintaining the old exercises of learning and especially the Readings. The material for Institutionary Lectures on the Common Law, such as those of Sir William Blackstone, scarcely existed in the 16th century. It was only in the course of this century that the Courts, by a bolder use of the writ *in consimili casu*, and with the aid of a curious apparatus of fictions freed themselves from the restraints and inconveniences of the ancient forms of action, and by permitting the development of more elastic remedies made it possible for the great judges of the following three centuries to build up the singularly inartificial and rational system of our modern English law. Thus the action of *Ejectment*, originally a form of *Trespass* in which damages only could be recovered, was allowed gradually to take the place of the ancient and cumbrous procedure of the real action, and became the ordinary and convenient means of trying questions of title and of recovering possession of land. Thus again, the action of *Trover* or *Conversion* grew out of the ancient action of *Detinue*, and was found to afford a very useful remedy in cases of infringement of the rights of personal property. But the most important addition to the machinery of the law was the action of *Assumpsit*, most singular of all the developments of the writ of *Trespass*, which became a recognised form of action in the second half of the 16th century, and gradually brought within the jurisdiction of the courts the

whole of that great class of claims arising out of contract or quasi-contract, which was and is ever growing in importance and complexity with the growth of the commerce and prosperity of the country.

Whilst the student was being drawn away from the Readings and Moots to the Library, there to study the rapidly accumulating volumes of treatises, and the still more important reports of cases decided by the courts in the exercise of their ever developing and enlarging jurisdiction, at the same time the business of the Courts, increasing with the prosperity of the country, was making it more and more difficult for the leaders of the Bar to give their time and attention to Readings, Moots, and other exercises of learning at the Inns of Court. It was no light task for a hard-worked benchers to give three weeks of the Lent or Autumn Vacation to a Reading, especially as it was at these times of the year that the Assize Courts were busy in the county towns. And the office of Reader was not rendered more attractive by the increasing cost and extravagance of the feasts which it was becoming the custom for the Readers to give during the period of their Reading. Orders for the government of the Inns of Court were made by command of the Queen, with the advice of Her Privy Council and the Justices of Her Bench and of the Common Pleas at Westminster, in Easter Term of the 16th year of Queen Elizabeth, A.D. 1574. Somewhat similar Orders were repeated from time to time during the following hundred years. These Orders have two main objects; to put some check upon what was regarded as the undue increase in the number of barristers, and to maintain or restore the ancient discipline, training, and qualifications for the Bar. By the Orders of 1574, it was directed that no more fellows were to be admitted to any Inn of Court than the chambers in the Inn would receive, counting two to a chamber; and (with a certain exception

in favour of the Middle Temple) that no more chambers were to be built. It was provided that none were to have chambers but such as exercised moots and other exercises of learning within three years after admission; and, further, that no Utter Barrister should be qualified to plead in Court, or to subscribe any bill or plea, unless he had been a Reader at an Inn of Court, or a Reader for two years at an Inn of Chancery, or had continued the exercises of learning for five years after call.

It is not quite clear what the qualification for call to the bar was in the reign of Queen Elizabeth. At Lincoln's Inn, in the year 1568, it had been ordered that no one should be called except upon the report of the Readers in the Inns of Chancery and two barristers "of the best lerned and discretest." They were to present their report before the term in which there was likely to be a call, and submit the names of half-a-dozen fit men or thereabouts. In 1594, certain rules for the Government of the Inns of Court were proposed by the Judges for the consideration of the Benchers, and the first of such rules was that no one should be called to the Bar but such as "have used the exercises of the House, as in arguing of cases, putting at bolts and keeping of the moots and exercises there three years in the least before they be called." To which the Benchers of Lincoln's Inn replied that there were "orders already taken by the Council within our House heretofore tending to the effect of the same article, which order we have observed and do purpose to continue the same." And with regard to the suggestion of the Judges that not more than three or four at the most should be called to the Bar at any reading, the Benchers made a statement which throws some light upon the kind of preparation for the Bar required at that time. "Touching a call of Utter Barristers at this time," they say, "it may please your Lordships to understand the state of our House, as now

it standeth, is that almost for this three years there hath been no call to the Bar, and our order is not to call at every Reading but once a year or in two years; and now there are many good students of nine years and ten years continuance, who, by reason of their study, their exercises and good behaviour by all that time are thought fit to be called." There had, in fact, been no call since the 2nd November, 1591, but at this council, on the 5th February, 1594, at which the Judges' proposals were considered, twelve students were called, four of these calls to be published at the next moot of the same term, four at the first moot during the Lent Reading, and four at the first moot in the following Easter Term. And in the June following a still larger number of students were called, amongst whom we may notice the name of Thomas Richardson,\* who became Speaker in the Parliament which condemned Bacon, and Chief Justice, first of the Common Pleas, and afterwards of the King's Bench. The number of years "continuance" required of students before call, fluctuated somewhat in the 16th and 17th centuries, and may at times have differed at different Inns. It was seven years in 1596; during the early part of the 17th century it became eight years, and in 1661 it was reduced again to seven years. Finally in 1762, by agreement between the four Inns of Court, it was fixed at five years. A sufficient idea of the general qualifications for call to the bar may be gathered from an order made by the

\* See Dyer's Reports, p. 188. b. "Richardson C. J. de C. B., at Assizes at Salisbury in Summer 1631, fuit assault per Prisoner la condempne pur Felony; que puis son condemnation ject un Brickbat a le dit Justice, que narrowly mist. Et pur ceo immediately fuit indictment drawn pur Noy envers le Prisoner, et son dexter manus ampute et fix al Gibbet, sur que lay mesme immediately hange in presence de Court." The Chief Justice stooped, and the brickbat knocked off his hat. To a friend who congratulated him on his escape, he said, "You see now, if I had been an upright judge, I had been slain." Evelyn called him "that jeering judge." (Foss.)

Benchers of the Inner Temple in a Parliament held on the 9th February, 1617.

"It is ordered that no man shall be called to the bar before he has been full eight years of the House, and been for all or most part of that time here resident in Commons, and shall be known to be a painful and sufficient student, and shall have usually frequented and argued grand and petty moots in the Inns of Chancery, and have brought in moots and argued clerks' common cases within this House, and are known to be of sound and good religion, free from popery, and shall show themselves all the time of their continuance within this House by usually resorting to the Church and receiving the Holy Sacrament. And if any man shall procure letters or messages from any great persons to the Treasurer or benchers of this House to be called to the bar, he shall for ever after be disabled to receive that degree within this House."

The Judges, supported by the King and the Lords of the Privy Council, did what they could to maintain the ancient forms. There was, perhaps, less zeal in this respect on the part of the Benchers and the Bar, amongst whom a feeling was growing up that the old exercises, the Readings and moots, whilst they imposed an increasing burden on the leaders of the Bar, were fast losing their importance and value as a practical training. In 1591 the Judges had called attention to the "late examples of short and few Readings," which they attributed largely to the "excessive and sumptuous charges of which Readings brought in of late time contrary to the ancient usage," which they fear may lead to an "utter overthrow to the learning and study of the law, and consequently an intolerable mischief to the commonwealth of this realm." The old rule was that the Reading in Lent should be by a "double" reader, that is to say, by a bencher who had already served as an Autumn reader, but when the Judges in 1594

proposed a rule that "no single reader be permitted to read in Lent," the Benchers of Lincoln's Inn replied that they would "endeavour to move and persuade such of the Benchers as are in course to read their double Reading to perform the same; yet it seemeth very difficult to effect, for that they suppose that their double Reading is rather a hindrance than a furtherance unto them in their proceeding besides their charge." Stow writing in the 16th century, says that the expenses of the Reader sometimes exceeded £1,000. The records show the increasing difficulty of supplying "double" Readers. In 1594 Mr. Townesende, who had been appointed Lent Reader, prays to be excused, but his letter "is thought to be over peremptory to be written to the bench, and to contain no sufficient matter of excuse for discharge of his double Reading." He nevertheless refused to read, and was fined £30, which was reduced to £20, and finally, on payment of £13 6s. 8d., the balance was remitted. Similar cases became very common. When, in 1633, it was Mr. Ughtred Shuttleworth's turn to read in the following Lent, he neither attended the Council at which the appointment had to be made, nor sent any intimation what he purposed to do, and inasmuch as his default was aggravated by the fact that he, "living in remote and unknown parts," had absented himself for a long time, the Benchers ordered, "though not without grief, to cut off from themselves a member so well esteemed of and so much respected by them, that the said Mr. Shuttleworth be put from the bench, and shall no longer retain nor hold the place of a Bencher of this House."

It is also very apparent from the records during the reigns of James I. and Charles I. that it was becoming more and more difficult to induce the members of the Inns of Court to discharge their duties in maintaining the Readings and exercises of learning at the Inns of Chancery. An

interesting example of this may be found in the case of John Selden, who, in 1624, then being an utter barrister of the Inner Temple, was chosen Reader at Lyon's Inn, but refused to read. Though thrice summoned before the Benchers of the Inner Temple, and "notwithstanding many courteous and fair persuasions and admonitions by the masters of the bench," he persisted in his refusal and was fined £20, and declared to be disabled to be called to the bench, or to be Reader of the Inner Temple. These disabilities were, however, removed a few years later, and he was called to the bench in 1633.

The Inns of Chancery, though connected with and under the control to a certain extent of the Inns of Court, appear to have been more peculiarly the houses of the attorneys and solicitors. The students of these societies were probably for the most part preparing for admission to the Inn of Court with which their Inn of Chancery was connected. Many of the students, however, became attorneys or solicitors, and the ancients and governing bodies of these lesser Houses consisted probably to a great extent of attorneys and solicitors. Before the reign of James I. it does not appear that any regular course of legal study was a necessary qualification for admission to practice as a solicitor or attorney. Their duties were regarded as ministerial only, and mechanical. Although the Inns of Chancery were appropriated to those who desired to apply themselves to what was then regarded as the merely clerical work of the profession, it appears that from a very early date the benchers of the Inns of Court found it necessary to take steps to prevent their students from neglecting the exercises of learning, in order to occupy themselves with more lucrative employment as attorneys. At Lincoln's Inn, on the 14th May, 1556, it was ordered that if "any man shall be admitted as a student, and after shall only exercise the office of attorney and shall not kepe the



lernynges in the vacations that then he shall lose the fellowship and his chambers." And again in 1614, one of the Judges' orders for the reformation of the Inns of Court directs that "there ought alwaies to be preserved a difference between a counsellor-at-law, which is the principal person next unto Serjeants and Judges in administration of Justice; and Attorneys and Solicitors, which are but ministerial persons, and of an inferiour nature; therefore it is ordered that from henceforth no Common Attorney or Solicitor shall be admitted of any of the four Houses of Court." A year or two later, on the 13th June, 1616, amongst a number of regulations made by the Bench of Lincoln's Inn, for the management of their Hall and kitchen, there appears an order, which looks almost like a joke, but was no doubt meant seriously, in these words:—"It is further ordered that the second third and fowerth Butlers be admonished from tyme to tyme to be diligent, and to ymploye themselves as attorneys or clarckes, and the wash-pott to doe the like, and not to keep howndes &c., w<sup>ch</sup> yf they shall neglecte, then are they to be removed." It seems sufficiently clear that notwithstanding strict and frequently renewed prohibition members of the Inns of Court occupying chambers practised as attorneys or solicitors. This is recognised by an order of the 2nd June, 1679, which directs that "henceforth noe practizeing Attorney or Solicitor of this House be called to the Bar." And the Joint Regulations agreed to by the four Inns of Court in 1762, which made the standing for the bar five years from admission, did not forbid the admission of attorneys and solicitors, but provided that they should not be called until they had discontinued practising as such for two years.

This digression upon attorneys and solicitors has carried us forward into the eighteenth century. We must return to the reign of Charles I. The Civil War began in August,



1642, and during the two years following no Council was held at Lincoln's Inn, no parliament at the Inner Temple, and probably no exercises were performed and no Commons held at any of the Inns of Court. In 1644 their work was resumed, but imperfectly and under great difficulties. The war and the disturbed state of the country still kept great numbers of their members in the country, either with one or other of the contending armies or at their own homes. The government of the Inns was under the control of the Parliamentary party,\* but many of their fellows took the side of the King. In November, 1646, an order of the Commons House was presented to the benchers of Lincoln's Inn by the Speaker, Lenthall, who was himself a bencher, by which they were directed to take care that no persons who had "adhered to the enemy against the Parliament" should be permitted to come again into any of their chambers or allowed to live in any of the Inns of Court or of Chancery. Diminished numbers rendered it difficult to maintain the exercises of learning or to carry on the business of the Inn at all. The Society of Lincoln's Inn became heavily indebted to the Steward, and in 1645 two of the benchers were directed to sell the plate of the house (except the spoons) and apply the proceeds to his satisfaction so far as they would go. The judges complain from time to time of the neglect of exercises, and in 1657 it was ordered by the Commons House that it should be recommended to the Protector and Council to take some effectual course, upon advice with the Judges, for reforming the government of the Inns of Court and for reviving the Readings in the several Inns, and the keeping up of exercise by the

\* When the civil war began Oliver St. John was treasurer of Lincoln's Inn, and the Speaker, Lenthall, was a bencher. In 1653, John Thurlow, Cromwell's Secretary of State, was called to the Bar, with a direction that his call "be published with all convenient speed," and three months later was called to the Bench.

students there. Accordingly certain propositions were made by the Judges for the reviving of the Readings, and at Lincoln's Inn Mr. Thomas Weld was appointed Reader, but he never read. After the Restoration a long struggle took place between the Judges and the more Conservative members of the Bench on the one side, who wished to restore the Readings, and an active and probably younger party on the other side, who regarded the Readings as unduly troublesome, extravagantly expensive, and of little practical value. Heavy fines were imposed time after time on benchers who refused to read. The result of this was that many leading members of the bar when called to the Bench refused the invitation. The state of things appears from an entry in the Black Book of Lincoln's Inn, of the 15th May, 1677, in which it is recited that :—

“In regard severall Barristers of this Society of antient standing have refused to come to the Bench, and considering how few there are likely to succede those that lately came upp, it is thought very expedient and for the service of this Society, that there be but one Reading from henceforth in every yeare, and likewise but one Reader chosen in each yeare, for this Society. Which is ordered accordingly.”

In fact, after this order of 1677, not only one but both readings were discontinued. In October, 1677, Mr. James Stedman was thanked for his reading in the Autumn vacation, but he was the last of the Readers of Lincoln's Inn. The Benchers in 1680 declared their resolution to read in their turns when there should be Readings at the other Inns of Court. Apparently there were no more readings at the other Inns. Roger North says that the last Reading at the Middle Temple was Sir Francis North's in the autumn of 1672, when he was Solicitor-General. His account of it is so realistic that I may be excused for quoting it at length.

"During his solicitorship his lordship kept his public Reading in the Temple Hall, in the autumnal vacation, in the year 1672. He took for his subject the statute of fines, and under that found means to exhaust all his learning upon that branch of the law which concerned titles and the transferring them, and the arguers against him did their parts also, who were the best lawyers of the Society at that time. As for the feasting part, it was sumptuous and in three or four days' time cost one thousand pounds at least. The grandees of the Court dined there, and of the quality (as they call it) enough; for his diffused relation, general acquaintance and station, as well as prospect of his advancing in the king's service, made a great *rendezvous* of all the better sort then in town at his feasts.

"He sent out the officers with white staves (for so the way was) and a long list to invite; but he went himself to wait upon the archbishop of Canterbury, Sheldon; for so also the ceremony required. The archbishop received him very honourably, and would not part with him at the stairs' head, as usually had been done; but, telling him he was no ordinary Reader, went down and did not part till he saw him pass at his outward gate. I cannot much commend the extravagance of the feasting used at these Readings; and that of his lordship's was so terrible an example, that I think none hath ventured since to read publicly; but the exercise is turned into a revenue and a composition is paid into the treasury of the society. Therefore one may say, as was said of Cleomenes, that in this respect his lordship was *ultimus heroum*, the last of the heroes. And the profusion of the best provisions and wine was to the worst of purposes, debauchery, disorder, tumult and waste. I will give but one instance: Upon the grand day, as it was called, a banquet was provided to be set upon the table composed of pyramids and smaller

services in form. The first pyramid was at least four feet high, with stages one above another. The conveying this up to the table, through a crowd that were in full purpose to overturn it, was no small work ; but, with the friendly assistance of the gentlemen, it was set whole upon the table. But after it was looked upon a little all went hand over head among the rout in the hall, and for the more-part was trod under foot. The entertainment, the nobility had out of this, was, after they had tossed away the dishes, a view of the crowd in confusion wallowing one over another, and contending for a dirty share in it."

Readers are still appointed annually at the Inner and Middle Temple. At the Middle Temple there is a Lent Reader and an Autumn Reader, and each Reader has a feast, to the cost of which he contributes by paying a fee. But there are no Readings.

Roger North survived his brother, Lord Guildford, and lived well into the 18th century. In his old age, he wrote a Discourse on the Study of the Laws, which was not published until 1824. It contains much wise advice to students, expressed in an excellent, if somewhat quaint style. He discusses the course of study and training to which a student for the bar should apply himself, under five heads:—(1) Reading ; (2) Common-placing ; (3) Conversing ; (4) Reporting ; and (5) Practising. Roger North died in the year 1734, about eight years only before Lord Mansfield became Solicitor-General. But the learning to which Roger North directs the student appears to us almost mediæval. It is somewhat surprising to read in a book, which is in many respects so modern, his eulogy of law French. "Some may think," he says, "that because the law French is no better than the old Norman corrupted and now a deformed hotch-potch of the English and Latin mixed together, it is not fit for a polite spark to foul himself with ; but this nicety is so desperate a mistake, that

lawyer and law French are coincident ; one will not stand without the other. . . . For really the law is scarce expressible properly in English, and when it is done, it must be *Françoise*, or very uncouth." It is plain from Roger North's Discourse that at the beginning of the 18th century the student for the bar received no training or preparation for the practice of his profession except such as was afforded by private study and attendance at the courts. His only reference to the Inns of Court is in the opening sentences of his discourse, in which he says that :—

"Of all the professions in the world, that pretend to book learning, none is so destitute of institution as that of the Common Law. Academick studies, which take in that of the civil law, have tutors and professors to aid them, and the students are entertained in colleges, under a discipline, in the midst of societies, that are, or should be, devoted to study ; which encourages, as well as demonstrates, such methods in general as everyone may easily apply to his own particular use. But for the Common Law, however, there are societies which have the outward show or pretence of collegiate institution ; yet in reality, nothing of that sort is now to be found in them ; and whereas in more ancient times there were exercises used in the Hall, they were more for probation than institution ; now even those are shrunk into mere form, and that preserved only for conformity to rules, that gentlemen by tale of appearances in exercises rather than by any sort of performances, might be entitled to be called to the Bar."

The form of exercises was maintained until recent times. At Lincoln's Inn they were given up in January, 1856. These "Exercises" were performed in Hall before 32 barristers. The form is described by Lord Brougham in his evidence given before the Select Committee on Legal Education in 1846. "A paper is put into the hands of the

student containing a proposition in law; he maintained that the widow was entitled to her dower, for instance, in certain cases. This is a paper consisting of about seven or eight lines put into his hand by the steward before he goes up, to what is called, "keep his exercise;" he then comes before one of the benchers and begins and as soon as he has uttered the first words, "I say that the widow shall have her dower," the bencher bows and the student retires and he has kept his "exercise." Anything therefore more entirely nugatory and more of a mockery as a test of legal acquirement cannot possibly be imagined, though it is certainly a remnant of a practice which in former times must have existed of a real and actual examination." It was no doubt a relic of the old moots.

According to Lord Campbell, who gave evidence before the same select committee, it was in the early part of the 18th century that it became the practice for students to go into attorneys' offices, and towards the middle of the century the system was established by which it became the almost universal rule for the student to become a pupil for from one to three years in the chambers of a Conveyancer, Equity Draftsman, or Special Pleader. No serious attempt, however, was made to revive the academic teaching of English law until Sir William Blackstone delivered his famous lectures at Oxford, in 1754, and persuaded Mr. Viner, who died in 1755, to endow the Oxford professorship which bears his name. The Inns of Court did not awake to a sense of their responsibility in connection with legal education until about fifty years ago. The attorneys and solicitors had already, in 1831, established their great Society which has done so much to maintain a high standard of education, efficiency and honourable conduct in their branch of the profession in England. In 1852 the Benchers of the four Inns of Court established the Council of Legal Education, and with the creation of this Council,

the modern history of legal education for the Bar in England begins and my story ends.

It has been far too long, and I must not detain you by attempting to make any practical application of the old story to the conditions of to-day. I venture to add just a word: The one great inheritance which we—and I speak of a heritage which is common to all of us—have received from the system which I have tried to describe, is the spirit of comradeship and good-fellowship, which I believe always has prevailed, as it still prevails, amongst men at the Bar: a spirit which largely assists in keeping alive that tradition of courtesy, of generosity in rivalry and, what is of far higher importance, of straightforward and honourable dealing, which makes our profession one of which—speaking as Chairman of the General Council of the Bar in England and as the guest of this great Association of the Bar of America—I may say that we are all of us justly proud.

JOSEPH WALTON.

### III.—PRIVILEGED COMMUNICATIONS : HUSBAND AND WIFE.

A QUESTION raised in the course of bankruptcy proceedings which some months ago were exciting interest, and were fully reported at the time in the daily papers, draws attention to a point of law which must affect a large number of persons, but which for one reason or another has not for many years given rise to any important decision. A husband, summoned to attend a private examination held under Sec. 27 of the Bankruptcy Act, was questioned as to the movements of his wife, who, though not the bankrupt, was required like himself for examination under the section, but could

not be found. When before the Registrar of the County Court which was seized of the matter, the husband refused to answer these questions, and upon an adjournment to the judge, it was contended by counsel on his behalf that the Court had no power to compel him to disclose facts, which were within his knowledge from having been communicated to him by his wife; and presumably (though the legal arguments are not reported) the Law of Evidence Amendment Act, 1853\*, and the cases which preceded it were referred to. The County Court Judge, however, held that upon the authority of a certain case (probably *Ex-parte Campbell. In re Cathcart* (1876), 5 Ch. App. 703), the husband was bound to make full disclosure, and upon going into the box he was asked not only where and when he had last seen his wife, but where she was going to, where he supposed she then was, and to what address he would direct letters, matters of which his answers showed that he had no knowledge beyond what had been communicated to him by herself at a recent interview.

With all respect to the decision of this particular Court, it is to be regretted that the husband's acquiescence in its ruling prevented the objection raised on his behalf from being argued elsewhere. *Ex-parte Campbell* may be an answer to the objection that the evidence of persons summoned under Sec. 27 is limited to questions concerning the debtor, his dealings, or property, but otherwise it has to do solely with the privilege subsisting between solicitor and client. In that case the solicitor of the bankrupt's father, summoned under a corresponding section of the Bankruptcy Act of 1861, refused to state where his client was then residing, on the ground that the place of residence of his client came to his knowledge in his professional capacity, and only in consequence of his

\* 16 and 17 Vict. c. 83.



employment as solicitor. The Court of Appeal held that this was an insufficient objection, and that unless the witness had been able to say that he only knew his client's residence because it had been communicated to him confidentially as a solicitor, for the purpose of being advised, and had not been communicated to the rest of the world, the privilege did not arise.

But a decision on the relations of solicitor and client has not necessarily any bearing upon those of husband and wife, which have always been regarded by the law as of a peculiar nature. The position of communications passing between husband and wife was discussed at great length in the case of *O'Connor v. Majoribanks* (1842) 4 M. and G. 435. This was an action of trover brought by the personal representatives of a deceased husband, in which it was held that the disability existing in those days of the husbands or wives of persons interested in a suit to give evidence continued during the lives of the survivors. But, in the course of his judgment, Tindal, C. J., referring to the rule that communications between husband and wife were at common law privileged, goes on to say:—"We are asked to confine the rule to cases where the communications are of a confidential nature. Such a limitation of the rule would very often be extremely difficult on application, and would introduce a separate issue in each case as to whether or not the communications were to be considered of a confidential character." And Maule, J., in reiterating that all communications between husband and wife were absolutely privileged, irrespective of their being confidential or otherwise, instances the Statute of Frauds, which by enacting that certain agreements must be in writing and signed by the parties to be charged, intended to prevent issues of fraud being raised in particular cases.

These judgments were delivered at a time when a feeling, which gathered strength as years went on, against the

evidence of persons being rejected on the ground of interest in the subject matter of suits, conviction for crime, and so forth, was beginning to be manifest.\* But Lord Denman's Act, passed in 1843 † (the following year), for the purpose of remedying this state of things, contained an express provision that the Act should not render admissible as witnesses parties to the record, or their husbands or wives. This provision was partly repealed by Lord Brougham's Evidence Act of 1851, ‡ which rendered parties to a suit for the first time competent witnesses, but not, so the Court of Queens Bench decided in the case of *Stapleton v. Crofts* (1852) 18 Q.B., 367, their husbands or wives. The difficulties suggested by that decision, were, however, set at rest, or were intended to be set at rest, by the Evidence Amendment Act of 1853, §, sec. 1, of which provides that "on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, etc." Sec. 2 provides that "nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or

\* The preamble to the Act for the Further Amendment of the Law of Evidence, 1869 (32 and 33 Vict. c. 67) runs: "Whereas the discovery of truth in Courts of Justice has been signally promoted by the removal of restrictions on the admissibility of witnesses, etc.

† 6 and 7 Vict. c. 85.

‡ 14 and 15 Vict. c. 99.

§ 16 and 17 Vict. c. 83, *supra*.

any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding, or in any proceeding instituted in consequence of adultery." But by sec. 3: "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."

And so the statute law remains in the present day, except that by sec. 2 of the Law of Evidence Act, 1869, above referred to, the exception contained in sec. 2 of the Act of 1853, in the case of proceedings instituted in consequence of adultery is abolished. It is true that in a dissentient judgment in *Stapleton v. Crofts*, Erle J. had pointed out that if the ground of the exclusion of the evidence of a husband or wife of a litigant was the preservation of the peace of families, as asserted from Coke upon Littelton downwards, the application of the rule led to strange inconsistencies; and he drew attention to the fact that both in the county courts and in bankruptcy the Legislature had found it necessary to admit the evidence of wives. But there is nothing in any Bankruptcy Act before or after 1853 which is inconsistent with the plain words of the first three sections of the Law of Evidence Amendment Act 1853. By sec. 27 of the Bankruptcy Act of 1883 (which deals with the discovery of a debtor's property), sub-s. 1, the debtor or his wife (*inter alias*) may be summoned to produce any documents in his or her custody or power relating to the debtor, his dealings, or property; and (sub-s. 3) the Court may examine on oath any person so brought before it concerning the debtor, his dealings, or property. But it has never been held with regard to this or corresponding sections in previous Acts that the Court is entitled to extract from the wife of a debtor information however obtained, and still less when the husband or wife, as the

case may be, is not the husband or wife of a debtor, but of a person whom it is desirable to examine in the bankruptcy of a third person.

Taking the questions specifically put to the husband in the case which suggested this article, it may be that he could not have refused to say when and where he last saw his wife.\* If he had persisted in his refusal because he thought it dishonourable to say anything which might be prejudicial to her interests, it would still have been open to the Court, which has always a discretion where the liberty of the subject is concerned, to decline to commit him for contempt. In a case of the *King v. the Inhabitants of All Saints, Worcester* (6 M. and S. 194), on a question of Settlement a wife was called to prove her marriage, in order to get rid of the effect of her husband's subsequent marriage with the pauper, and it was held that she was a competent witness. But Bailey J., in reference to this wife's testimony, said: "If she had thrown herself on the protection of the Court, on the ground that her answer to the questions put to her might tend to criminate her husband, I am not prepared to say that the Court would have compelled her to answer; on the contrary, I think she would have been entitled to the protection of the Court."

But if to the questions, "What is your wife's present address?" or "Who is her solicitor?" the witness had replied, "I only know from what she told me at our last interview, and I decline to answer," it is conceived that the judge would have had no power to commit him to prison for this refusal to answer. It is certainly surprising that sec. 3 of Lord Brougham's Act should have given rise to so little litigation, for many persons during the last five and forty years must have been in a position to seek its protection.

\* Semble in *Ex-parte Campbell*, supra.

It must be noticed that the old common law taint of inadmissibility with regard to evidence of this kind was finally and entirely swept away by the Act of 1853. If the persons concerned do not raise an objection to giving the evidence, the Courts no longer are bound to reject it as savouring of interest and conducing to perjury. It is by a saving clause only, a clause framed in the interests of public policy, that these persons are not to be forced to give evidence of a certain kind against their will. To use the words of the learned editor of *Taylor on Evidence* (8th ed. sec. 909) which words do not necessarily import a disagreement with the remarks of Erle J. referred to above: "This wise enactment rests on the obvious ground that the admission of such testimony would have a powerful tendency to disturb the peace of families, to promote domestic broils, and to weaken, if not to destroy, that feeling of mutual confidence, which is the most endearing solace of married life. The protection is not confined to cases where the communication sought to be given in evidence is of a strictly confidential character, but the seal of the law is placed upon all communications of whatever nature which pass between husband and wife. It extends also to cases in which the interests of strangers are solely involved, as well as to those in which the husband or wife is a party on the record."

J. K. F. CLEAVE.

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#### IV.—SUZERAINTY: MEDLÆVAL AND MODERN.

BY the Transvaal Convention of 1881 Her Majesty's Government guaranteed to the inhabitants of the Transvaal territory "complete self-government subject to the suzerainty of Her Majesty," upon certain reservations and limitations. The conditions were fully and clearly set out, but the use of the word "suzerainty" was viewed, probably in both countries, with considerable distrust. It had an archaic and mediæval sound, and no one seemed to know quite what it meant. The settlement with the Transvaal was a subject upon which almost everyone in this country had a strong feeling, and naturally the meaning which the word, obviously used as descriptive of the future relative positions of the two States, England and the Transvaal, was intended to convey, was much discussed. That a considerable difference of opinion existed in the minds of statesmen and lawyers soon became apparent. In the discussion in the House of Lords that immediately followed the announcement of the terms of the Convention, Lord Selborne, then Lord Chancellor, is reported to have said that "Suzerainty means that the Suzerain is lord paramount of the people who are subject to it. . . . The control of foreign and frontier relations essentially distinguishes a paramount Power. No war can be made upon adjoining Native tribes, no treaty can be made with (foreign) Powers except by the authority of (the suzerain) country . . .," inferring that the vassal State had full control over its internal affairs, but of those alone. The Earl of Kimberley also intimated that the word expressed the assignment to the Vassal State of "independent power as regards its "internal Government," and that that alone was to be exercised by it. An ex-Lord Chancellor, Earl Cairns

on the other hand, after quoting Sir Evelyn Wood's definition of the word Suzerainty, "That the country is to have entire self-government as regards its own interior affairs; but that it cannot take action against or with an outside Power without permission of the Suzerain," expressed his opinion that the reservation of the foreign relations did not express the real meaning of the word, for if it were so, the Sovereign of Great Britain would be Suzerain of Afghanistan according to the arrangement with Abdurrahman. The Marquis of Salisbury at the same time stated that suzerainty did not preclude interference in internal affairs.

In the discussion arising out of the deliberations on the same subject in the House of Commons it was laid down by the Prime Minister, Mr. Gladstone, that suzerainty though quite distinct from sovereignty had marked relations to it. The statement may possibly have been absolutely correct, but by reason of its incompleteness it was not a particularly satisfactory explanation.

In 1884 the subject appeared to lose its practical importance in this connection, as in the Convention of that year between this country and the Transvaal, or as it then was styled, the South African Republic, no mention was made of suzerainty. It may be observed, however, that the Convention of 1881 was not abrogated. The new Convention was an agreement that certain new Articles should be "substituted for the Articles embodied in the Convention of 1881." It seems plain, therefore, that the suzerainty remained, the change being merely a variation of the conditions. Both conventions are of course now torn up, but the actual relationship between the two States immediately before the outbreak of the war, presumably that of suzerain and vassal, must still be of interest in considering the action on one side and the other which preceded the war. It happened that in 1882,

while the first Convention was newly in force, the writer ventured to contribute to the *LAW MAGAZINE* an article on "Suzerainty," in which an attempt was made to explain the relative position of a Suzerain Power and its Vassal State to each other and each to the world in general. The Editor of the *LAW MAGAZINE* has suggested that it may not be inopportune at the present time to deal with the subject again, and that a reproduction of the views then expressed would be considered of somewhat greater value than an explanation written under the possible influence of recent events. In acceding to the suggestion, the writer desires to state that the following examination of the subject is a reproduction of the views expressed in 1882 with such revision only of stated facts as have been rendered necessary by events which have happened since that date.

The subject to be discussed, the meaning of the term Suzerainty as applied to States can best be dealt with by asking, and so far as may be, answering the following question: What are the rights and duties of Suzerain and Vassal States? There have been even in recent times several instances of States subject to Suzerainty, besides the Transvaal, as for instance, Roumania, Servia and Greece (before 1830) to the Ottoman Porte, and if their positions are considered it is apparent that the rights of Vassal States and consequently the reciprocal duties are not in all instances identical, but that they are capable of at least some modification by agreement or otherwise. From this it is obvious that an absolute answer cannot be given to the question in the form put. It is proposed, therefore, to consider the rights consequent upon the status of suzerainty and vassalage where or in so far as they are not modified by any special terms, and then to discuss to what extent they can be varied without the Vassal State being on the one hand entirely merged



in its Suzerain Power or on the other becoming itself free and independent of all control at its hands. It may be assumed that the rights (irrespective of certain conditions specially engendered by the particular mutual relationship) possessed by the Suzerain and the Vassal, one or the other, or both in some proportion, as the case may be, are the rights which, if exercised by a single sovereign State, are called the Rights of sovereignty. By this expression is meant all the rights which a sovereignty possesses, not those alone which can *only* be exercised by a Sovereign power. Now these Rights of sovereignty are fairly agreed upon by the authorities on International law, though their classification of them may somewhat vary; if then it can be determined in the particular case, which State, suzerain or vassal, exercises them, or in what proportion each exercises them, the more difficult part of the question under consideration will be answered.

The distinguishing attributes of sovereignty may be said to be Independence\* and Equality; † and, consequent on the possession of these fundamental attributes, sovereign States are privileged to exercise certain rights which may be divided into two classes, internal, sometimes termed constitutional, and external, or international, rights.

The international rights are the right to determine and

\* Vattel, Law of Nations Prelim., secs. 15 and 21. Klüber, Droit des Gens Moderne de l'Europe, M. Ott, ch. I., secs. 22, 37, 45. Twiss Law of Nations, Peace, sec. 9. Woolsey, International Law, sec. 37. Heffter, Le Droit International Public, sec. 26. Phillimore, International Law, vol. I., art. cxliv. Théodore Ortolan, Règles Internationales et Diplomatie de la Mer, ch. III., p. 56. Bluntschli, Das Moderne Völkerrecht, art. 64. Manning, Law of Nations, p. 92. Halleck, International Law, I., ch. iv., sec. 1. Calvo, sec. 104, and others.

† Vattel, Prelim., secs. 18 and 21. Lib. ii., sec. 36. Klüber, sec. 89, Woolsey, secs. 37, 51. Twiss, sec. 12. Heffter, sec. 27. Phillimore, vol. I., art. cxliv. Th. Ortolan, ch. III., p. 57. Bluntschli, art. 81. Halleck, I., ch. v., sec. 1. Calvo, secs. 296-343, and others.

organise the Constitution ; \* the right to maintain order, sometimes called the right of police ; † the right of property or domain, so far, at all events, as it relates to the possession of territory (*jura possessionis*) ; ‡ the right of legislation ; § of plenary and criminal jurisdiction, || in which may be included the right of remission and pardon ; ¶ the right of appointing magistrates ; \*\* of coining money ; levying taxes ; regulating ranks, and such like.

The international rights are the rights of legation or embassy ; †† the right to negotiate and conclude treaties and alliances ; ‡‡ the right of war, neutrality, and peace ; §§ and the right of domain—that is, of acquiring (*jus possidendi*), and alienating property ; ||| all, in fact, which concern relations with other States.

\* Vattel I., secs. 31-33. Klüber, ch. I., sec. 22. Bluntschli, art. 68. Phillimore, vol. I., art. cxlv., cxlviii. Manning, p. 93. Halleck, II., ch. iv. sec. 2. Calvo, sec. 105, &c.

† Vattel I., sec. 174.

‡ Vattel I., sec. 203. Twiss, sec. 139. Heffter, sec. 29. Phillimore, Vol. I., Art. cxlv., cl., &c. Manning, p. 93. Calvo, Livre IV.

§ Loyseau, *Traité des Seigneuries* III., 4. Réal, *La Science du Gouvernement*, IV., p. 121. Twiss, sec. 150. Bluntschli, art. 68. Halleck, I., ch. iv., sec. 14. Calvo, sec. 734. Loyseau, indeed, considers that the right to make law comprehends "tous les autres cas de souveraineté," III., 9.

¶ Loyseau, III., 4, 28. Réal, IV., p. 121. Twiss, sec. 150. Phillimore, vol. I., art. cccxvii. Manning, p. 93. Halleck, I., ch. iv., sec. 15. Calvo, II., 227.

Loyseau, III., 4. Vattel, I., sec. 173.

\*\* "Qui sont les loys vives et parlantes." Loyseau, III., 17.

†† De Wicquefort, *The Ambassador and his Functions*, Digby's translation, p. 6. Bynkershoek, *Quæstionum Juris Publici*, lib. II., c. 3. Vattel, II., sec. 154 ; IV., sec. 57. Twiss, sec. 184. Bluntschli, art. 68. Phillimore, vol. II., art. cxv., cxvi. Halleck, I., ch. viii., sec. 1. Calvo, sec. 400.

‡‡ Vattel, II., sec. 154. Klüber, secs. 36, 141-230. Phillimore, vol. I., art. cxlvii. ; vol. II., xlv. Halleck, I., ch. viii., sec. 1, &c. Calvo, sec. 680.

§§ Loyseau, III., 4, 25, 27. Réal, IV., 121. Vattel, III., sec. 4. Klüber secs. 36, 231-329. Twiss, *Law of Nations, War*, secs. 1-3. Creasy, *First Platform of Law*, p. 95.

||| Vattel, I., sec. 203. Klüber, secs. 123-140. Twiss, sec. 105, &c. Phillimore, vol. I., art. cxlv., ccxxii., &c. Manning, p. 93. Calvo, Tome I., Livre IV.

As already pointed out, Vassal States are not alike entitled to the same rights and subject to the same duties. It is proposed therefore to divide them into two classes (which it will appear is a natural and not a mere arbitrary division), namely, those subject to vassalage not modified by express terms—or to borrow a phrase from Hertius (*De Specialibus Rom. Germanici Imperii Rebus Publicis*, II., sec. 33, note 10), “nude vassalage”—and those subject to a more onerous vassalage, and to show the relations which each of the classes of vassalages and their suzerainties bear to sovereignty.

First of all, then, can a State subject to nude vassalage be and is entitled to all the rights of sovereignty—in other words, can it be and is it a purely sovereign State?

Grotius, *Lib. I.*, ch. 3; XXIII., 2, writing “*de nexu feudali*,” says the obligation “*nec regi aut populo jus demit summi imperii*.”

De Wicquefort (Page 16) refers to some princes who “possess their fiefs in full Sovereignty,” and who are “Sovereigns in effect,” and he quotes with approbation an answer of Hugh de Lionne to Pope Urban III., in which he referred to “vassals who by virtue of their first investiture received their fiefs with all the rights of Sovereignty.” (Page 25.)

Vattel (*I. Sec. 8*) speaks of sovereignties being given in fee and sovereigns voluntarily rendering themselves feudatories of others, limiting the circumstances in which sovereignty continues to exist in these words: “When the homage leaves independency and sovereign authority in the administration of the State, and only means certain duties to the lord of the fee; or even a mere honorary acknowledgment, it does not prevent the State or the feudatory prince being strictly sovereign.”

Klüber (*Sec. 22*) says the simple relations of fiefs held of

a foreign government, "ne préjudicient point à sa Souveraineté."

"Halleck (Ch. iii Sec. 7) considers that States subject to feudal dependence or Vassalage are still considered as sovereign unless their Sovereignty is destroyed by their relation to other States."

Heffter (Sec. 22, iii) writes "Une puissance ayant donné une Souveraineté en fief," homage "ne porte aucun préjudice aux droits territoriaux du vassal, ni a ses rapports avec les souverains étrangers ;" and Wheaton quotes this passage with approval. (Commentaire sur les éléments du Droit International, Part I., ch. ii., iv.)

Creasy (First Platform of Int. Law, p. 95) is of opinion that "a State may profess feudal Vassalage to a foreigner" and yet not be "out of the pale of International Law."

Phillimore (Vol. I, xcvi) considers that "States that stand in a feudal relation towards other States are nevertheless sometimes considered as independent sovereignties."

Calvo (Sec. 43) also says "La Souveraineté d'un état dans ses relations internationales n'est pas modifiée d'avantage . . . par une dépendance féodale," which he there describes as "nominale," and which would appear to refer to what is here described as unmodified vassalage. Bluntschli (Art. 76) says—"Wenn die Souveränität eines States abgeleitet erscheint von der Souveränität eines andern Hauptstates und in Anerkennung und in Folge dieser Ableitung eine theilweise Unterordnung jenes States unter diesen fort dauert, so wird der eine Vasallenstat und der andere lehensherrlicher oder oberherrlicher Stat genannt. Die volkerrechtliche Selbständigkeit des erstern wird durch die nothwendige Rücksicht auf den letztern beschränkt." He therefore grants something in the nature of sovereignty to a vassal State, but defining it as one of which the sovereignty is derived from that of another

State, he appears to deduce therefrom that it must therefore be subordinate and its independence restrained on the ground of international right. This general statement would, having regard to the attributes of sovereignty, Independence, and Equality, apparently mean that a vassal State could not be sovereign. If, however, the opinion of one recognised as so sound an international lawyer may be criticised, it may be suggested that though his definition may be correct his deduction does not necessarily follow. It can hardly be maintained, for instance, that England when held by King John as a vassal fief of the Roman See\* was, from an international point of view, subordinate and dependent, and not a Power exercising full sovereign rights, at all events in its relations with all Powers other than the Papal See, although in this instance the sovereignty was certainly re-granted by the suzerain Power.†

A class of writers has hitherto intentionally not been quoted on this point; those of French nationality, who, dating from the sixteenth to the eighteenth centuries, write not so much on general International Law as on the science of government, and particularly treat of the feudal system of tenure. These writers, perhaps, might not be considered of so much authority if it were not that feudalism was of distinctly Frank growth,‡ and specially

\* Bodin, in his *Les Six Livres de la Republique*, Livre Premier, ch. IX., p. 165, asserts that he had seen the Bull of Pope Innocent III. constituting England and Ireland fiefs of the Papal See, and that by the terms therein laid down they were held in faith and homage at the charge of paying a tax and rent, annual and perpetual, a thousand marks sterling on St. Michael's Day, besides the St. Peter's Pence.

† Immediately preceding the act of investiture John resigned his kingdoms into the hands of the Pope's Legate and received them back from him to hold as a fief of the Church. Vattel I., 154, citing Matthew Paris.

‡ Stubbs, *Const. History of England*, Vol. I., p. 251. Hertius, *De Feudis Oblatis*, sec. 2. Réal, IV., p. 140, says it was the Franks, when they established themselves in Gaul, who invented the usage of fiefs.

flourished among the Frank nations, and therefore, as suzerainty originated from the system of feudal tenure,\* greater importance may fairly be attached to the opinions of these French writers on this subject than might otherwise be their due.

Bodin, in his *Six Livres de la Republique* (published in 1593) devotes to this question part of a chapter, under the heading "Du Prince tributaire ou feudataire & s'il est souverain." He seems to experience considerable difficulty in answering the question he therein raises, for, after saying, "Celuy est Absoluëment souverain, qui ne tient rien, apres Dieu, que de l'espee. S'il tient d'autrui, il n'est plus souverain," he points out the difficulty in these words: "Si donques ceux qui tiennent en foy & hommage ne sont pas souverains il n'y aura quasi point de Prince Souverain. Et si nous accordons que ceux qui tiennent en foy & hommage . . . soient souverains il faudra confesser par mesme suite de raisons que le vassal et le seigneur, le maistre & le serviteur sont egaux en grandeur, en puissance, en autorité." (Livre Premier, ch. ix., p. 162). But he nevertheless comes to the conclusion that a feudatory rendering "hommage simple" (*placitum hominum*), which will be shown to correspond to the state of a vassal Power subject to nude vassalage, is not absolutely sovereign, as he is "homme d'autrui c'est à dire serviteur" (p. 171).

Loyseau, in his "Traité des Seigneuries," published in 1610, says: "C'est une grande question, si le Prince feudataire peut estre souverain;" but he answers it by remarking that "Il est bien vray, que la protection le tribut et la feodalité rabaissent & diminuent le lustre de l'État souverain, qui sans doute n'est pas si pur, si souverain & si maiestatif (s'il faut ainsi dire) quand il est subiect à ces

\* "C'est l'établissement des Fiefs qui lui" (à la Suzeraineté) "a donné la naissance parmi presque toutes les Nations de l'Europe." Réal, IV., p. 139.

charges : mais le Prince qui le possède ne laisse pourtant d'estre souverain en effect," and he dissents from and points out the inconvenience of Bodin's definition of an absolute sovereign, remarking that by his account almost all the kingdoms of the world are feudatories either of the Holy See or of the German Empire, and that it is against common sense to hold that these kingdoms are not sovereign (ch. ii., pp. 42-48).

Réal, again, in his "La Science du Gouvernement" published in 1765, asserts that "La féodalité rabaisse l'Etat Souverain et entraîne avec soi de la dépendance dans certaines circonstances ; Mais le Prince vassal non lige peut exercer tous les actes de Souveraineté, sans que le Prince à qui il doit l'hommage puisse y mettre obstacle ni par voie de ressort ni autrement, l'hommage que ces sortes de vassaux sont obligés de rendre & la redevance qu'ils peuvent être tenus de payer aux termes de la première investiture, diminuent la splendeur de la souveraineté, sans mettre d'obstacle à l'exercice de ces droits dans toute leur plénitude." And, again, he asserts Les Souverains, pour être vassaux d'autres Souverains, ne cessant pas d'être Souverains eux-mêmes. La féodalité . . . n'empêche point par elle-même, l'exercice des droits de la Souveraineté." (Vol. IV., pp. 132 and 140.)

It would seem, therefore, that both the writers on General International Law, and those who have more particularly considered the subject of national seignory, are practically unanimous in affirming that vassal States can, and when subject only to nude vassalage, do possess the rights of sovereignty.

The authorities on this point have been quoted at some length for the reason that vassal States admittedly acknowledge the supremacy of their Suzerains, and would appear therefore, to some extent, to lack the attributes of

sovereignty, Independence and Equality. How to reconcile this fact with the apparently contradictory conclusion just arrived at is no doubt difficult.

Is it that the sovereignty referred to does not include the general rights both external and internal, but only the latter? It can hardly be so, for the possession of these external rights is the especial criterion of sovereignty. Many States obviously not altogether sovereign possess full power of home government. The great English dependency of India, many of the Colonial possessions of this and other nations, the individual States of the North American Union, and many other States may be mentioned as possessing the right of self-government as regards internal administration (with the exception, perhaps, of appeal in civil actions), but which certainly are never reputed to possess sovereign rights.\* It would appear that what is meant is rather that States in a condition of simple vassalage possess all the rights both external and internal of sovereignty in their relations both with foreign powers other than their suzerain, and also in relation with that power, although as between the vassal and the suzerain they may be and in fact are restricted by certain *conditions* necessarily inherent to the status of vassalage, these conditions being of such a nature as not to be incompatible with any of the admitted general rights of sovereignty. If this is the correct interpretation of the apparent contradiction, the question as to the rights of a vassal State

\* As striking instances of the possession of marked rights of internal government not giving sovereign rights, the hereditary colonies of North America and the colony of Rhode Island, prior to the independence of the United States of America, may be instanced. The government of the former descended in hereditary succession and the latter by free election, without any control on the part of the home Government, yet all continued to form integral parts of the British Empire as completely as the other colonial possessions.

See Mr. Gladstone's answer to Earl Percy in the House of Commons, May 5th, 1881; Hansard, vol. 260, p. 1831.



may be considered partly answered, but it still remains necessary to consider what the conditions so inherent to vassalage are.

The comprehensive idea of the dependence of a State as vassal on another State as suzerain is derived from, and analogous to, that of the feudal state of dependence of an individual vassal on his seignor, and the conditions attaching to the dependence may be considered as identical. Feudalism, as has been said before, is of distinctly Frank growth, and although there were somewhat similar systems in force previous to the general adoption of this feudalism, as, for example, the Roman Emphyteusis, and the English system of Dependence, none of them were connected in any way with it, and as they were all superseded by it\* it is only necessary to consider for the purpose here requisite this Frank system. This system depended on the connection with the superior either by Commendation or by Beneficium. The former was the voluntary binding of a person to a lord, whether king or not, to be recompensed by the protection to be thenceforth afforded by the lord to his inferior, and was personal. The latter was the voluntary binding of a recipient of land to the lord, whether king or not, who granted it, in return for the gift of the land, and was also recompensed by the duty of the lord to protect the vassal and his land so received by him.

The former tie involved the obligation of fealty, the latter of homage,† which may be considered as sometimes including fealty.‡ Homage therefore designates the

\* For instance, in England the system of Dependence gave way to that of Frank Feudality after the Conquest.

† Stubbs, III., 514. This accords with Réil's statement that "*Foi est relatif à la personne. . . . Hommage à la terre.*"—IV., p. 149.

‡ Réil, IV., 149 says "*foi*" and "*hommage*" seem to present only one and the same idea. This is so in the more limited sense of homage; there the terms become identical, the homage only necessitating the obligation of fealty, but it is not so in its more extended sense.

engagements of vassalage consequent on the holding of land on feudal tenure. It was, according to the French authors, of three kinds:\* 1st, the Ordinary Homage, which bound the vassal to render to the suzerain fidelity (*fiance, fiducia*), obedience to his final jurisdiction (*ressort de la justice, justitia*), and service in war (*service, servitium*), whether personal or by deputy, for a limited period; 2nd, the Plain or Simple Homage, which involved only the obligation to live faithfully and to render service in war by deputy;† 3rd, the Liege Homage, which was a strengthened form of ordinary homage, the service lasting as long as the war in which the lord was engaged endured, and being personal as will be seen by comparing the forms of oath given in Britton,‡ the oath taken to a liege lord containing the words, "I will bear you faith of life and limb," the oath to a lord not liege omitting the words, "of life and limb." Besides these definite duties, homage, as the ceremony itself showed, inferred the rendering of respect or reverence. Bracton, Book II., c. xxxv. (8), says:—"Item qualiter & per quæ verba fieri debeat homagium? Et sciendum, quod ille, qui homagium suum facere debet, obtentu reverentiæ quam debet domino suo, adire debet dominum suum . . . & non tenetur dominus quærere suum tenentem, & sic debet homagium ei facere. Debet quidem tenens manus suas utrasque ponere inter manus utrasque domini sui per quod significatur . . . ex parte tenentis reverentia."§ From this it will be seen that the duties attaching to each description of homage were the obligation to be faithful, to render the lord some service in war and to hold him in

\* Brussel, *Normal Examen de l'usage general des Fiefs en France*, pp. 95-120. Réal, IV., pp. 150-152.

† Réal omits the service in his first definition of plain homage, but it is evidently an accidental omission, as he expressly includes it later in the chapter, page 159.

‡ Lib., III. c. 4. They are given in Stubbs, III., p. 515, n. 2.

§ See also Glanvil, lib. 9, cap. 4, temp. Henry II, Calvin's Case, 7 Rep., 4.

respect, the special conditions of *ordinary* homage being resort to the jurisdiction of the lord, *liege* homage requiring in addition to this that the service should be personal.

In the older English books only two species of homage are spoken of—the *Homagium Feodale*, which was in fact the plain or simple homage, and the *Homagium Ligeum*.\*

If it be necessary to determine which of the three kinds of homage was the one due from a sovereign vassal, it will appear that it could only be the plain or simple homage, the *homagium feodale*. Réal, indeed (iv., 159), says that the simple homage is the kind rendered by those who, without being by the nature of their fiefs in any dependence on another prince, yet render homage for the purpose of obtaining protection. This is exactly the case of sovereign vassal States.

It is clear that liege homage could not be due. In the famous *Calvin's Case*, a case argued in the time of James I., before all the judges of England, and reported by Lord Chief Justice Coke, it was laid down that "*homagium ligeum* is as much as *ligeance*," and "*ligeance* is a true and faithful obedience of the *subject* due to his sovereign."

Réal also (iv., 158) says the oath of liege homage is that which a *subject* owes to a sovereign, and the general usage of the word bears out the statement. It is, therefore, not applicable to a sovereign seignory. It is true the word liege appears in some of the forms of homage rendered by sovereigns to other sovereigns, but this had reference to their obligations, not as sovereigns of their own kingdoms, but as holding also possessions unconnected with their kingdoms, as dukes, counts, etc. As, for example, the form of oath taken by Edward III. of England to Philip of Valois:—"Le Roy d'Angleterre ayant les mains jointes entre les mains du Roy de France, & celui qui parlera pour le Roy de France dira au Roy d'Angleterre. Vous

\* Calvin's Case, 7 Rep., 7.

devenez homme lige du Roy de France, qui ici est comme Duc de Guyenne et Pair de France Comte de Poitou et de Monstrueil et luy promettez foy et loyauté porter : dites Voire, et le Roy d'Angleterre dira Voire" (Bodin, L., ch. ix., 170).

In taking this oath, Edward III. bound himself personally, not in his sovereign capacity as King of England, but in a subordinate capacity as Duke of Guienne, a part of the kingdom of France, this homage being, in fact, identical with that rendered by the other Peers of France.\* The same observations are applicable to the vassalage of some of the Scottish Kings to England if, as appears most probable, the homage they rendered was liege. Malcolm IV. of Scotland did homage to Henry II. of England in 1157 and 1163;† but it was for the county of Huntingdon,‡ or "for the lands of Cumberland, Northumberland, and Huntingdon," as Hollinshed says, "under condition that it should in no maner wise prejudice the franchises and liberties of the Scottish kingdome."§ William the Lion, who succeeded Malcolm, took an oath of allegiance to Henry II., without any reservation, the charter containing the words "*Wilhelmus Rex Scotiæ devenit homo ligius domini Regis Angliæ*;"|| but at that time Scotland was practically deprived of all title to sovereign rights, her chief castles being surrendered to Henry, and the Scottish bishops and barons compelled to take a direct oath of fealty to the English Crown.¶ Richard I. having freed Scotland from this bondage,\*\* homage was again done to the Kings of England,†† but with the distinct protest that it was rendered for lands

\* R<sup>éal</sup>, IV., 159.

† Hollinshed's *Chronicles*, by Hooker, III., 69. Stubbs, I., 555.

‡ Stubbs, I., 555.

§ *History of Scotland*, p. 185.

|| Hollinshed, *Chronicles* III., pp. 95, 96. Scotland, p. 189.

¶ Stubbs, I., 556.

\*\* A.D. 1189.

†† To John in 1200. It was also rendered to Henry III. in 1251 and 1257, &c. Hollinshed, *Chronicles* III., pp. 245, 254, &c.

held in fief within the realm of England.\* After 1291 the Scottish kingdom fell for a time entirely under the control of England, and her kings of the House of Balliol, sovereign in name alone, took, as might be expected, the liege oath without any reservation.†

Again it would appear that ordinary homage could not be due. A characteristic of both liege and ordinary homage was the obligation to resort to the jurisdiction of the lord, and this again could not attach to sovereign vassalages. This obligation appears, according to the French authorities to be the distinguishing mark of certain inferior non-sovereign fiefs or seignories. There is some danger of falling into an error in reading the earlier authors on this point owing to a confusion in the nomenclature under which they refer to the superior seignories. Loyseau is the origin of this danger, for he calls those seignories *Suzerain* which have superior power but yet acknowledge a supreme, that is, it is presumed, a sovereign overlordship, of course incorrectly according to the present system of nomenclature, where the former is styled *Vassal* and the latter *Suzerain*. This seignory, he defines as the "*dignité d'un Fief ayant Justice ;*" (IV. Sec. 2) that is therefore not subject to resort to the jurisdiction of the superior lord. This definition is adopted by the later authors, and is affirmed as correct by Merlin in his *Répertoire de Jurisprudence*. Whether by this seignory with superior power is meant a sovereign vassal State or not is not quite clear—if it is so it is a direct assertion that such States possess unrestricted jurisdiction, and that ordinary homage was not due from them. If, as seems most probable, a non-sovereign vassal State is meant, the inference is to the same effect, the addition of sovereignty could, of course, not derogate in any way from the rights

\* Green, *History of the English People*, p. 182. Stubbs, I., p. 556.

† See Hollinshed, *Chronicles III.*, pp. 290, 350, &c. Scotland, p. 208.

of the seignory, and if the superior seignory, non-sovereign, were distinguished by being not subject to the jurisdiction of the supreme, or as we should term it, the suzerain seignory, a superior sovereign seignory must *a fortiori* be also so distinguished; the sovereignty cannot add to, though it may diminish, the obligations of the seignory. Whether the form of simple homage was that adopted in the case of sovereign vassalages or not is, however, of little consequence. It is sufficient to recognise that the special characteristics of the other two kinds of homage were from the nature of the seignories absent in the case of sovereign vassalages, and that their duties were therefore only fidelity, respect, and such service as one sovereign State can render to another.

Many instances in proof that these, and these alone, were in fact the conditions of tenure might be given. A few only will be referred to.

That service was a condition, even in the case of a sovereign vassal State, is shown by the case of the Papal See and its vassal State Naples: whenever the Popes declared war against anyone, the Kings of Naples were in arms for the defence of the Papal Power.\* That it, in modern times, has been considered a condition of vassalage generally the instance of Egypt sending a military contingent to the assistance of Turkey in the Turko-Russian war of 1877-78 sufficiently demonstrates.

Again, in proof of the non-liability of vassal States, whether sovereign or not, to the jurisdiction of the suzerain: Scotland prior to 1291, although, as already pointed out, not subject to liege homage, was nevertheless in some sort vassal to the Crown of England; † but except during the short period of complete subjection to the power of Henry II. there was no appeal from the Scottish

\* Bodin, I., ch. ix., p. 174.

† Stubbs, I., p. 555; Green p. 180

Courts to the jurisdiction of the English suzerain.\* Also, in the case of the King of Sardinia, when a vassal of the German Empire for the Dukedom of Savoy and his Piedmont and Montferrat possessions, from the judgments rendered in these States there was no appeal either to the Aulic Council or to the Chamber of Wetzlar.† To come down to later times, Egypt, the Barbary Regencies, Servia, Greece, Moldo-Wallachia, all have been, or are vassal, yet not subject to the jurisdiction of their suzerain, the Porte. It may here be noted that when the Transvaal received its freedom, subject to suzerainty, the right of appeal to Her Majesty in Council ceased.‡

Admitting the correctness of the deductions as to the rights and duties of vassal States drawn from the authorities, and the analogy of the tenure of feudal fiefs, and referring back to the definition of sovereign rights, it appears that without express conditions, vassal States, where they are considered to be *de facto* sovereign, possess in full all the rights consequent on the attributes of sovereignty,§ with the simple restriction against the exercise of the same in any manner derogatory to the rendering of the fidelity, service, and respect due to their suzerains.

It is clear that the exercise of internal rights cannot in any way interfere with the proper rendering of these duties, sovereign vassal States must therefore hold them as entirely as do other sovereign States.

With respect to the internal rights, there may be cases in which the rights, though possessed may be partially

\* Green, pp. 181, 183.

† Réal, IV., 139.

‡ The Att-Gen., Sir Henry James, in answer to Sir Henry Peek in the House of Commons, May 2nd, 1881.—Hansard's Debates, vol. 260, p. 1534.

§ That this is so the consideration of any one right peculiar to sovereignty shows. To take one, the right of legation: Gentilis gives this right to those "qui pares sunt."—De Legationibus, Liber Secundus, cap VII.-X. Twiss, Peace, sec. 186, to those "qui summi imperii sunt [compotes inter se," or to those "sui juris," specifying thereby by paraphrases the two attributes.—Equality and Independence.

restrained, and it will be well, therefore, to consider shortly these cases.

The condition of service can hardly affect the question, fidelity and respect may.

The first right mentioned under the head of international rights is that of legation or embassy. There may be some doubt whether the respect due to the Suzerain is compatible with the representation of the vassal at the Court of the suzerain, or with the direct negotiation between the two, but the balance of authority on the subject of the right of legation would seem to negative the doubt.

Grotius admits the right of legislation to those States which are joined by an unequal league, of which vassalage is an instance, "*cum sui juris esse non desinant.*" Lib. I., ch. iii., xxiii., 2. Lib. II., ch. xxviii., ii., 2.

De Wicquefort (p. 16), speaking of "Princes who . . . possess "their fiefs in full sovereignty . . . so as to owe only simple homage, notwithstanding it be accompanied with some acknowledgments " adds, "yet that does not hinder 'em . . . from sending Embassadors everywhere, even to the Lord of the fiefs," and he instances the Duke of Parma and the King of Naples, before the Kings of Arragon had annexed the Two Sicilies, sending ambassadors to the Pope.

Vattel (iv. sec. 58) considers that vassals who are not subjects retain, if they have not expressly renounced the right of sending ministers to their suzerains, and of receiving their minister in turn.

Klüber (Sec. 141) only admits to the class of States in which he includes vassal States, a "*capacité limitée*," but this evidently goes too far, as it draws no distinction between the right with regard to the suzerain State, and with regard to other foreign States.

Bluntschli refers to treaties made between vassal and suzerain States, and admits the right. (Art. 444).



Most of the other writers on International Law admit the *jus legationis* to be one of the rights of vassal States generally, but do not refer specially to it in connection with the suzerain; this aspect of the question can, however, hardly have escaped their observation, and their admission may be taken to extend to these relations.

It may be presumed, that what has been said as to the right of legation will apply equally to the right of negotiation or of entering into treaty agreement. This, as well as the former, depends chiefly, if not entirely, on the assumption of equality or independence, and if the vassal State is considered so far on a footing of equality with, or independence of, its suzerain that it can be represented directly at the Court of that power, so must it be for the same reason held to be entitled to enter into negotiation and conclude treaties with it.

Again, as to the rights of war and alliance. The fidelity owed by the vassal may hinder the exercise of these rights in the case of the suzerain being one of the parties to the war or the projected alliance. In the instance of war, the duty of fidelity would naturally forbid the vassal to take up arms against the suzerain, but the criterion of the justice of a war, is the justness of the cause of war. A war undertaken against the suzerain power, except for the purpose of the preservation of the vassal State, would be a breach both of the obligation of fidelity and of the law of nations; but as suzerainty gives no right of interference with the affairs of the vassal, but only to certain services, so an attempt to interfere with its freedom or other privileges may, it is presumed, be justly repelled by force. In such a case, it is not the vassal State that first commits a breach of the fidelity it owes, but the suzerain State that first commits a breach of its pledge to protect and defend its vassal, this pledge being the duty of the Suzerain corre-

lative\* to that of the vassal to do due service ; the breach of obligation on the part of the suzerain must absolve the vassal from his duty. Where the suzerain is engaged in war with another Power it would appear that the same obligation of fidelity would prevent the vassal combining with the enemy. Whether the duty of service would on the other hand always require him to take part in the war on the side of his suzerain will be presently considered.

Similarly as to the right of forming alliances, the vassal may justly form an alliance defensive, or even offensive, with a third Power, but it must not be to the prejudice of the suzerain if offensive, and if defensive it must only be directed against the latter, and it could only in fact be so if the suzerain were, as just pointed out, to break its pledge of protection by assailing the independence or other rights of the vassal.

So far as to the rights of the vassal State derived from its rights of sovereignty. One other remains unconnected with the rights of sovereignty, but which has incidentally been already fully commented on—that is, the right of protection. This was one of the most important conditions of every variety of feudal tenure ; the lord pledged his faith to protect and defend his vassal in return for the pledge of the vassal to be faithful, and to render service. That the obtaining of protection was one of the chief objects of vassalage is well shown by a curious case quoted by Réal (iv., 163), on the authority of Albert d'Estrasbourg, of two nobles—Humbert, Dauphin of Auvergne, and Simon, Count of Savoye—becoming vassals, the one of the other, obviously solely for the purpose of mutual protection in case of need.

In defining the rights of the State, subject to nude vassal-

\* As to the mutuality of the obligation see Bracton II., xxxv. (2).

age, the duties have been fully described with one exception. It has been shown that service was always due, but it has not been demonstrated to what extent. Can the suzerain claim assistance as due whenever he elects to declare war against, and for as long as he is at war with, another State? or, is the assistance only to be rendered when the suzerain is in extremity.

That the assistance is to be always rendered when the suzerain is in extremity is clear by referring to the feudal principle: even the "ordinary" vassal, whose service was limited usually to forty days, was not freed by such service, the duty of mutual protection would be neglected if in time of need, even after this limited time the vassal deserted his suzerain, and it is expressly laid down without any limitation that in such circumstances the aid should be continued. For example, Bodin, lib. I., ch. ix., 166, says: "*Il n'est licite au vassal de laisser son seigneur au besoin, . . . le vassal mesmement celui qui est lige doit secours.*" That the assistance must be rendered during the continuance of all wars which the suzerain may be waging can be in a similar manner inferred. All vassals owed service, limited or unlimited, personal or by deputy, without reference to the danger to the suzerain, but merely to his need, the service must have been due therefore in every war waged by the suzerains, vassal States should be equally liable, and, as has been shown in the case of Naples, the practice appears to bear out the principle. Also, whatever limit there may have been in the case of an individual vassal, there is no trace of any limit to the time for which a vassal State considered itself bound to render service, and again the principle is in conformity with practice, "Plain" Vassalage, it has been pointed out, most nearly corresponds to the Vassalage of States, and the service of "plain" vassals was not limited in time.

The next question to be determined is, when is the

vassalage nominal, and therefore possessing all the attributes of Sovereignty.

The vassalage is clearly sovereign if so defined by the terms of the first investiture, or by what in modern time generally takes its place, the convention of settlement, when, in fact a sovereignty has been expressly given, "en fief;" it must be so also if the vassalage is not limited by any terms in this investiture or convention. Loyseau (II. 49) points out that where sovereign princes established "hautes seigneuries" capable of sovereignty, and they wished to create what he calls "seigneuries Suzeraines," by which as we have pointed out he probably meant non-sovereign vassal lordships, they did not content themselves with retaining the feudality, but *by express condition* they retained to themselves the sovereignty, the inference being that the sovereignty, if not so retained by the suzerain, became by the fact of the simple grant, an attribute of the vassal seignory, and this is in strict accord with the idea of simple vassalage as already described, and might fairly have been presumed. On the other hand, if the suzerain is seen to be in the possession of some of the rights naturally belonging to the vassal State, and which, if exercised by it would be sovereign attributes, it is plain that the vassalage is something more than nude or nominal, and it may be presumed that the sovereignty has been reserved by the suzerain. Many cases may be cited, in which the suzerain has permitted the vassal to exercise some sovereign rights, strictly reserving to itself the abstract sovereignty, not one can be quoted in which the suzerain has retained a single sovereign right, while admitting that the vassal is a sovereign State. From this follows the important deduction, that in all cases where the suzerainty is not plainly nominal, as the abstract sovereignty is in the suzerain, the vassal State cannot exercise any rights not expressly

granted to it, it matters not whether under compulsion or no, without encroaching on the sovereignty of its suzerain. It is not forgotten that an attempt has been made by some writers on International Law to make abstract sovereignty a divisible quality by including vassal, protected, tributary, confederated, indeed all States bound as it is termed by an unequal alliance in an arbitrary class which they have termed semi-sovereign (*mi-souverain, halbsouveran*).\* The word if a proper one would seem to apportion sovereignty between the States, but it is obviously an incorrect term.† Heffter (sec. 19), points out that it is vague, and presents even a kind of "contre sens;" Wheaton, calls it a solecism; Austin (pp. 258-9) considers the epithet "to import that the governments marked with it are sovereign and subject at once," and he gives it as his opinion that "there is no such political mongrel as a government sovereign and subject;" and Phillimore (Vol. I. Art. lxxvi) speaks of States being so designated with "admitted impropriety of expression." It is plain that its use has led to confusion, for the writers who adopt it with greatest confidence disagree as to the meaning to be attached to it. Their general opinion is that it describes the possession by the States so named of all interior rights, but a modification only as some say, a complete absence according to others, of the external or international rights. Twiss, on the other hand, considers that the term suggests a subordination of position rather than a modification of the manner in which the foreign relations are maintained, and Sir Robert Phillimore, in his judgment in the case of

\* Moser, *Europäischen Völker-Rechts*, Buch, I., sec. 26. Martens, sec. 20. Klüber, sec. 24. Ortolan, I., p. 42. Heffter, sec. 19. Twiss, sec. 24. Bluntschli, art. 92. Calvo, sec. 62.

† With greater propriety of expression Hertius speaks of "quasi-regna," Neyron of "Etats du second ordre," and Réal of States governed by "princes-sujets." The latter insists that "*La souveraineté est une et indivisible, La partager c'est détruire*," IV., iii., 20.

*The Charkich*, (L.R. 4, A. & E. at p. 77) said that he was "inclined to think that the sovereign of a "State in the latter category" (half sovereignty) "may be "entitled to require from foreign States the consideration "and privileges which are unquestionably incident to the "sovereign of a State who is in the former category" (Sovereignty absolute and pure). Whichever of these meanings attaches to the word it is submitted that it is a term not applicable to non-sovereign vassal States, if it is intended by it to derogate from the possession of entire sovereignty by the suzerain in respect to its vassal state.

It is hardly necessary to state that the conditions peculiar to feudal vassalage which have been shown to attach to nominal vassalages must also attach to the more onerous vassalages. The observations, therefore, which have been made with reference to the duties, respect, fidelity and service, of nominally vassal states in regard to their suzerains, and the effect of such duties in partially restraining the exercise of rights, equally apply to those vassalages not merely nominal, and need not be repeated. The duties owing to the peculiar relationships are the same, and their effect in restraining rights must be also the same where at least the suzerain has allowed the vassal to exercise those rights at all.

The next question is, what rights can be reserved by the suzerain without the vassal State being indistinguishable from the other dominions of the suzerain; what rights must be reserved without the vassalage becoming simply nominal and the vassal entirely sovereign. It is difficult, considering the question upon principle, to specify any one of what are called the sovereign rights of a State, which may not justly be reserved by the suzerain. It is true that some limited power, at all events of interior government must be allowed the vassal, or the name would cease to convey any meaning, but there would

appear to be no limit either upon principle or in practice to the partial or complete reservation of any particular right or rights.

What rights must be reserved to maintain more than a nominal vassalage is somewhat more difficult to determine. It is submitted, however, that they must be not only some, but all the external or international rights of sovereignty. No instance can be cited in which a State subject to vassalage has or has had the general right of war, neutrality, and peace; of alienation of territory; of legation or embassy, without possessing them all, and being *ipso facto* a sovereign State, subject to no vassalage other than nominal.

It may be well here to cite instances in proof of the statements herein put forward. Examples in the Middle Ages of vassalages merely nominal, and which did not derogate from the possession of any of the rights of sovereignty can be freely given. Whether any exist at the present time or are likely yet to be formed is doubtful. The numerous feudatories of the Papal See at various times, such as Arragon, England, Naples (from the 11th century to 1818), Sicily, Poland, Sardinia and many others\* were all kingdoms and sovereign. Scotland, as already shown, was at one time a sovereign kingdom, vassal of England, and may have been also of Norway.† Some at least of the States subject to the Roman Empire of the Germans were also of this class. The rights exercised by the German States vassal to the Empire varied at different periods, and their extent was frequently disputed. Prior to the Peace of Westphalia, indeed, their rights were so doubtful that it is almost impossible to determine their international position. It

\* See Bodin, lib. I., ch. ix., 195.

† It is stated by Bodin that the terms of Vassalage to Norway were faith and homage, and the payment of ten marks of gold on a new king coming to the throne.—Bodin, lib. I., ch. ix., 165.

seems to be admitted that they were not, up to that date, possessed of sovereign power, and that the German Emperors insisted on their right to regulate the foreign relations. They would seem to be at that time, therefore, non-sovereign vassal States, having no international status. If they did at any time exercise any one of the external rights of sovereignty—as, for instance, by sending public Ministers to Foreign States—it may well be that this was allowed, not on any principle, but owing rather to foreign intrigue and desire to weaken the Empire on the part of the nation admitting such Minister. After the Peace of Westphalia, on the other hand, the German States enjoyed, as a consequence of the Imperial capitulations,\* the right to form offensive and defensive alliances amongst themselves and with foreign Powers (which shows they could exercise the right of peace, neutrality, and war), and the right of sending and receiving public Ministers ;† in fact, *all* the rights of Sovereignty. They were, therefore, merely nominal vassals of the Empire. Vattel, indeed (IV., sec. 59), refers to them as “a Republic of Sovereigns.” It is not forgotten that the judges of the several States were under the supreme jurisdiction of the Chamber of Wetzla ; but the Chamber being formed, in fact, by the States themselves, the jurisdiction cannot be considered a sign of subjection to the suzerain, but rather as an arrangement for the constitution of a common appellate court.

Examples of vassal States, on the other hand, possessing none of the external rights of sovereignty, but all or only some of the internal rights, may also easily be multiplied. Normandy, Bretagne, and Flanders‡ were all vassal to

\* Paix d'Osnabrück, art. VIII. Paix de Münster, secs. 62, 63. See Schoell *Traité de Paix*, Tom. I. pp. 89, 113.

† Vattel, II., sec. 154. Bluntschli, art. 76 (1).

‡ Before Francis I. renounced his rights in favour of Charles V., by the Treaty of Madrid, A.D. 1515.—Merlin, Art. “Bar,” p. 8. See also Bodin p. 172.



the Crown of France before their union to that kingdom ; they certainly were not privileged to exercise any international rights, but they did exercise some rights of internal government. It is said that they were in constant and peaceable possession of the right of making laws ; they did not possess every interior right however, notably that of final jurisdiction, for all the judgments given in their "Parliaments" were subject to appeal to the "Parliaments" of the King.\*

To come to more recent times, the State of Kniphausen, in North Germany, at least subsequently to 1825,† was a State vassal to the Duchy of Oldenburg, and possessed many interior rights, such as judicial power and the rights entailed by having a free commercial flag ; but again no international rights.‡ The Sovereignty was exercised by the Duke of Oldenburg, and this included all the rights with respect to foreign relations.§ Of the internal rights, that of legislation was wanting, at least in its entirety ; the Federal Acts of the German Confederation being expressly binding on the State.||

Egypt, Moldo-Wallachia, Servia, Greece, may also be referred to as States which at some time possessed all rights not international, while they all at other times were restrained from exercising some of them To take Egypt first, as being one of the most important. In 1840 (it is hardly necessary to consider the position of the country prior to that date, but it may be mentioned that it is epitomised in Sir Robert

\* Merlin, Art. "Bar.," p. 6, &c.

† Prior to the dissolution of the Roman Empire of Germany, it was a fief of that Empire, it then became an independent sovereignty until occupied by Napoleon I, and transferred by him to Russia.

‡ See the Convention between the Duke of Oldenburg and Count Bentinck. Herslet, Map of Europe by Treaty, I., 722.

§ Art. II, and IX. of the Convention.

|| Ibid, art. III.

Phillimore's judgment in *The Charkieh*),\* the administration of the Pachalic was granted by the Sultan of Turkey to Mehemet Ali and his descendants in the direct line, with the right to collect and retain to his own profit taxes and customs, and to maintain military and naval forces.\* The internal rights, however, were not wholly granted. The right of independent legislation was denied, for, by Section Four of the Act annexed to the Convention for the pacification of the Levant, which defines the status of Egypt, all the laws of the Ottoman Empire were to apply to Egypt. Also, the full right of determining the Constitution was not granted; this is shown by the fact that when it was desired to modify the succession to the Viceroyalty, it was not done by the Viceroy, but by a special Firman issued by the Porte.† The powers granted under this Convention were confirmed and extended by various Firmans of later date. By the Firman of June 8th, 1867, complete autonomy, including the right of legislation, was granted to Egypt. It recites that the "internal administration of the province, and consequently its financial, material, and other interests are confided to the Government of Egypt" without any reservation, even to the extent of the furtherance of those interests by "entering into arrangements with foreign agents," and by it was also given permission to the Egyptian Government to "frame such regulations as may seem necessary in the form of special Tanzimat for the Interior."‡ The original sovereign rights, however, of the Porte were expressly reserved; no treaties or conventions having any

\* See the Convention between Great Britain, Austria, Prussia, and Russia and Turkey, 15th July, 1840; Herslet's Treaties, V., 535.—Map of Europe, II., 1008.

† Firman, May 27th, 1866.—Herslet's Treaties, XIV., 1025. Confirmed by Firman, June 8th, 1873.—Ibid, p. 1029.

‡ Confirmed by Firman, September 10th, 1872.—Herslet's Treaties, XIV., 1027.

political signification might be concluded by Egypt, all such power being reserved to the Porte. The Firman of June 8th, 1873,\* made the granting of internal and the withholding of external rights still more definite. By it the civil and financial administration, the authority to make internal regulations and laws, contract loans, maintain troops to guard and defend the country, confer military rank up to colonel,† and coin money were confirmed to the Khedive; but the Egyptian land and sea forces were to be considered part of the Imperial Ottoman army and navy, and were to carry the Imperial flag, the money was to be struck in the Imperial name, and foreign political relations were to be conducted by the Porte.

Servia, previous to the Treaty of Berlin,‡ was subject to the suzerainty of the Porte. It is somewhat uncertain, however, when it was first considered to have developed from a simply subject to a vassal State. After the struggle of the Servians for liberty in the first twelve years of the present century, the Porte, by the Eighth Article of the Treaty of Bucharest§, promised to make over to them "the administration of their internal affairs." An insurrection broke out the following year, and was put down by the Porte, and consequently no effect was given to the provisions of this Article. Then came the Treaty of Ackermann in 1826, || by the Fifth Article of which the Porte promised to put the clauses of the Eighth Article of the Treaty of Bucharest into immediate execution, and (Annex 2) to grant to Servia certain privileges, the most important being the "choice of its Chiefs" and the "Independence of its internal

\* Hertslet's Treaties, XIV., 1029.

† Internal defence, it may be presumed, not requiring an army officer of any higher rank.

‡ Article XXXIV.

§ Between Russia and Turkey, May, 1812.—Hertslet's Map of Europe, III, 203C.

|| Hertslet's Map of Europe, I., 758.

administration." It was not, however, until after another Russo-Turkish war and another treaty, that of Adrianople, in 1829,\* containing a renewal of the promise of the Porte, that any of these privileges were in fact given to Servia. In that year by Hatti-Sherif, and in 1830, 1833, and 1838 by Firman, constitutional rights were formally granted. In none of these treaties or proclamations was Servia referred to as other than a subject part of the Empire, and the Servians as equally with the Turks, subjects of the Porte. It is generally said that Servia, as well as Moldavia and Wallachia were placed under the suzerainty of the Porte at the Peace of Paris in 1856, but on reference to the Treaty † it will be seen that though as to Moldavia and Wallachia, it is declared that they "shall continue to enjoy under the Suzerainty of the Porte" their privileges, and the Porte is spoken of as their "Suzerain Power,‡ with regard to Servia, it is simply declared that it shall "continue to hold of the Sublime Porte." Nevertheless, in 1862, in the Protocol of Conference signed by the Seven Powers, including Turkey,§ relative to the affairs of Servia, the Porte is styled the Suzerain Power.|| If, however, Servia was vassal in 1862 it is difficult to see any reason for considering that she was not equally so in 1830. It was then that Servia first received an independent constitution, and the subsequent Treaty and Firmans did little more than confirm the same. Certainly none of the later Firmans can be considered in the light of the first creation of a vassalage. It is clear, indeed, that Servia claimed to be vassal only, not only before the Treaty of 1862, but

\* Hertslet's Map of Europe, II., 813.

† Hertslet's Map of Europe, II., 1250.

‡ Art. XXII., XXV., &c.

§ Hertslet's Map of Europe, II., 1515; Hertslet's Treaties, XI., 575.

|| In the Firman of April, 1867, the Porte adopts the same title.—Hertslet's Map of Europe, III., 1800.

before that of 1856, for in the Protest addressed by the Servian Government to the Sublime Porte in 1854 against the occupation of the Principality by Austrian troops,\* the Porte is referred to as the "Suzerain Court," and this would hardly have been done if the position had not been so considered at Constantinople, as the document is couched in the most deferent terms, evidently with no intention of raising an unfriendly feeling, which an assumption of an unauthorised degree of freedom would certainly have done. By the Firman, then, of that year (1830),† hereditary succession was decreed to Prince Milosch with the right of "Internal Administration" (administration of justice, liberty of worship, organisation of armed force for the security of the public peace in the interior, &c.), but Turkey‡ reserved the right to maintain and garrison the Imperial fortresses in the country.‡ This might not have been intended to in any way check the free exercise of internal government but that the Porte considered it still had a right to interpose in internal matters, is shown by the Firman of the 24th of December, 1838 § in which the Sultan orders that a Council shall be formed in the manner he thereby defines, to decide questions relating to justice, taxes, number of troops, &c., and deciding other constitutional arrangements.

The interference of the Porte in the internal arrangements of Servia was gradually minimised, and the administration more freely exercised by the Prince, but Servia obtained no international rights while the Porte remained Suzerain, the number of her troops was theoretically, at least, strictly limited to that "necessary to maintain the tranquility and *internal* order of the

\* Hertslet's Map of Europe, II., 1196.

† Ibid, 842.

‡ It was not till 1867 that Turkey withdrew these garrisons.—See Firman of April 10th, 1867; Ibid, III., 1800.

§ Hertslet, Map of Europe, v. II., 968.

country,"\* and apparently no attempt was openly made to enter into relations with foreign powers, or affect the right to do so.†

The history of the vassalage of Moldavia and Wallachia from the treaty of Bucharest, to the freeing of the United Provinces under the name of Roumania by virtue of the Treaty of Berlin (Act XI.III.) is similar proof of the power of the Suzerain to grant limited or unlimited internal government, and the practice of not allowing to the Vassal any exterior rights.

The Treaty of Ackermann in 1826 confirmed the right of the Principalities to self-government, but reserved to the Porte the right to be consulted in the appointment of the Hospodars. The Treaty of Adrianople, in 1829, again confirmed to the Principalities "the privilege of an independent "internal administration" under the suzerainty of the Porte. By the Treaty of St. Petersburg, between Russia and Turkey, in 1834‡, the Porte formally agreed to recognise the constitution of the Principalities, "finding nothing in "them which can affect its rights of sovereignty;" and to publish a Firman in accordance with the same, it being settled by the same Treaty that the garrisons in the two provinces should be fixed at the pleasure of the Porte, which should also give colours to the garrisons and a flag to the merchant navy. Later in the same year the Firman§ was published, by which Hospodars were to be elected to exercise full "internal adminis-

\* Treaty of Kanlidja, 1802. Hertslet's Treaties, XI., 575; Map of Europe, II., 1515.

† At least before 1869. In that year the Servians assumed a Constitution, the 8th Article of which commences, "Le prince représente le pays dans toutes ses relations extérieures et conclut les Traités avec les Etats étrangers."—Hertslet, Treaties, XV., 471. By this time, however, all dependency on the Porte had been repudiated by Servia, although its independence was not generally recognised.

‡ Hertslet, Map of Europe, II., 936.

§ Hertslet, Map of Europe, II., 951.

"tration." By an Act between Russia\* and Turkey in 1849,\* the Sultan assumed the right to elect the Hospodars for seven years, and to alter the organic status. By the Treaty of Paris,† in 1856, the Principalities were to "continue to enjoy under the Suzerainty of the Porte . . . the privileges and immunities of which they "are in possession," defined to be "Independent and "National Administration as well as full liberty of "Worship, of Legislation, of Commerce, and of Navigation," and the right to maintain a "National Armed Force . . . to maintain the Security of the Interior, and to ensure that "of the Frontiers." Their rights were also secured by the Convention signed at Paris in 1858 ‡ to the Principalities "under the Suzerainty of His Majesty the Sultan." They are enumerated as Free Administration exempt from any interference of the Porte with the Executive, Legislative, and Judicial Power, but it is expressly laid down that the "Suzerain Court shall arrange with the Principalities the "measures for the defence of their territory in case of "external aggression," and that "As hitherto the International Treaties which shall be concluded by the "Suzerain Court with Foreign Powers shall be applicable "to the Principalities in all that shall not prejudice their "immunities." Until the events immediately preceding the Treaty of Berlin, the rights secured under this Convention of Paris were fully enjoyed by the United Provinces, but it is clear that neither these nor any antecedently possessed were other than strictly non-international rights. The Firman of Investiture of Prince Charles of Hohenzollern as Prince of the United Principalities of Moldavia and Wallachia § plainly shows this, and it is, moreover,

\* Hertslet, Map of Europe, II., 1090.

† Hertslet, Map of Europe, II., 1250. Hertslet's Treaties, X., 533.

‡ Hertslet, Map of Europe, II., 1329; Hertslet's Treaties, X., 1052.

§ Constantinople, October 23rd, 1866.—Hertslet, Map of Europe, 1783.

important as showing that the granting of full interior rights was not considered to deprive the Suzerain of the Sovereignty over his vassal State. After conferring hereditary rank and the prerogatives of Prince of the United Principalities, —the prerogatives referring to the immunities enjoyed by Moldavia and Wallachia,—the Firman enjoined him to “respect in their integrity my rights of Sovereignty over “the United Principalities,” it limited the armed force to be maintained to a number considered, it is presumed, sufficient for defence and ordered that no Treaties or Conventions should be directly concluded with Foreign Powers other than arrangements of an unofficial or non-political character.

Greece again, previous to 1830, was a vassal State under the suzerainty of the Porte. The Treaty of London, in 1827,\* between England, France, and Russia defined the position to be held by Greece thenceforward to be under the “Suzeraineté” of the Sultan as Lord Paramount (“Seigneur Suzerain”), the Greeks to be governed by authorities whom they should choose and appoint themselves, but in the nomination of whom the Porte should have a defined right, and to have the right to send to and receive from the Signatory Powers, Consular Agents (not Ministers, thus showing that in the opinion of these Powers Greece was not entitled to the *jus legationis*).

At the Conferences between the same Powers in 1828† and 1829,‡ the Protocol drawn up in the latter year being adhered to by the Porte in September, 1829,§ it was determined that this control on the part of the Porte over the nomination of the Greek authorities should cease; but, that by virtue of the suzerainty, every Chief of Greece should still receive his investiture from the Porte. The

\* Hertslet, IV., 304.

† Hertslet, Map of Europe, 798. Hertslet, State Papers, XVII. 405]

‡ Hertslet, Map of Europe, II., 804. § Ibid, 812.



administration should be assimilated to monarchical forms, and be entirely in the hands of an hereditary Prince, but still no international rights were granted until the following year, when, by a Protocol signed at London,\* and accepted both by Greece and by the Ottoman Porte,† the same Powers determined that Greece should be freed from vassalage and raised to the dignity of an independent State under a sovereign Prince.

The relations between the Barbary States and the Porte have been very indefinite. From before the time of Charles II., Algiers (until its seizure by France in 1830), Tunis (until informally annexed by France in 1881), and Tripoli were practically independent, while acknowledging the supremacy of, and theoretically, at least, dependent on the Porte as Suzerain.‡ Each frequently entered into treaty engagements with European Powers directly, and these Powers have often enforced redress in vindication of the injuries done to their subjects, immediately, and, in the first instance from the dependencies themselves. Treaties, for instance, can be referred to between Great Britain and Algiers from 1682 to 1824., France and Algiers from 1764 to 1830,|| Sweden, Austria, Denmark, Spain, and the United States of America with the same State from 1729 to 1816;¶ also between Great Britain and Tripoli from 1662 to 1816,\* between Holland, Austria, France and Spain and Tripoli from 1713 to 1830,†† between Great Britain and Tunis, 1662 to 1875,‡‡ and

\* Ibid. 841.

† See Treaty of London, 1832, Art. IV. Hertslet, Map of Europe, II., 895.

‡ See Molloy, De Jure Maritimo, IV., sec. 4.

§ Hertslet, Treaties, I., 58-87. Martens, Recueil de Traités, I., 68 —Nouveau Supplément, I., 660.

|| Martens, Supplément, III., 68.—Nouveau Recueil Général, VII., 362.

¶ Martens, Recueil, VI., 296.—Nouveau Recueil, V., S., 6.

\*\* Hertslet, Treaties, I., 125-153. Martens, Supplément, I., 140.—Nouveau Supplément, I., 493.

†† Martens, Supplément, I., 98.—Nouveau Recueil, X., 52.

‡‡ Hertslet, Treaties, I., 157-174; III., 28; XIV., 541. Martens, Supplément, I., 147.—Nouveau Recueil Général, XX., 78.

between other European Powers and the same State from 1712 to 1856,\* but it has never been admitted by the Porte that they had the right to enter into such engagements, and not only has the Porte frequently addressed commands to these dependencies relative to their conduct in matters in which foreign nations were interested,† but they have rendered or promised obedience to these orders; and indeed the European Powers have acknowledged the right of the Porte to enter into treaties on behalf of these States.‡ Again, although redress has been enforced directly against the dependencies, Turkey has also been held liable for losses sustained at their hands. In 1783 for instance, Austria obtained a guarantee from Turkey against the “korsaren aus den Barbaresken-kantonen,”§ and in 1826 Russia exacted an indemnity from the Porte for the damage to subjects and merchants of Russia “by the pirates of the Regencies of Algiers, Tunis and Tripoli.”|| In proof also that the European Powers never admitted these Dependencies to the *jus legationis*, none of them ever accredited public Ministers to their Courts but only Consuls.¶ The relations indeed are said to be “of an anomalous and perplexing character,”\*\* and “the necessity of the cases, and the reason of the thing have rendered this irregular mode of international proceeding unavoidable.”††

\* Martens, Supplément I., 92.—Nouveau Recueil Général, XVII. 1re P., 179.

† To Algiers, Tripoli and Tunis in 1803 (obedience to a treaty of navigation and commerce which the Porte had concluded with Prussia), Martens, Recueil (2), VIII., 465. To Tripoli in 1848, 1850, 1855, 1858, 1859, 1869 (Suppression of Slave Trade), Hertslet, Treaties, IX., 738; X., 602; XI., 551, 553; XIII., 836, 837, 843, &c.

‡ See Treaties between Great Britain and Turkey (Tripoli and Tunis), 1675, Hertslet, Treaties, II., 346; Prussia and Turkey (Algiers, Tripoli and Tunis) 1803, Martens, Recueil, (2), VIII., 465; Great Britain, France, Italy and Turkey (Tripoli), 1873, Hertslet's Treaties, XIV., 540.

§ Martens, Nouveau Recueil Général, XV., 459.

|| Treaty of Ackermann, Art. VII. Hertslet, Map of Europe. I., 751.

¶ Phillimore, I., art. xc.

\*\* Ibid. I., art. lxxxvi. Boyd's, Wheaton, p. 50.

†† Ibid. I., lxxxvii.

A case from the Far East may be also referred to of the exercise of external rights by the Suzerain. In Japan prior to the suppression of their régime by the Mikado, in 1871,\* the Daimios held apparently a practically analogous position to vassal princes in the West, subject to the suzerainty of the Mikado.† The Mikado, in 1867, by treaty with the European Powers, threw open certain ports to foreigners for the purpose of trade, and this international arrangement he ordered by proclamation to be notified throughout not only the government territory but the territories of the Daimios,‡ as an international arrangement affecting them, and lawfully made by him on behalf of those his vassal States.

As bearing in the same manner on the Suzerain's right to control the international relations of States vassal to him, the action of the Chinese Government may be quoted with regard to the proposal of France in 1881 to deal directly by Treaty with Tonquin. The Chinese Ambassador, acting on the instructions of his Government, at once remonstrated on the grounds that China was the suzerain State, and that in that character it could not view with indifference anything which might alter the international relations of Tonquin.§ The independence of Tonquin had already been stipulated by the Treaty with France of 1875, but the fact that the objection was put forward tends to confirm the principle of the Suzerain's right to the control of international arrangements which concern the vassal State.

A similar remark may be made with reference to the action of the Spanish Government in 1881 with regard to the granting of a charter to the British North Borneo Company, giving power to it to trade, fly flags, &c., and

\* Bluntschli, art. 77.

† Sir Rutherford Alcock, *The Capital of the Tycoon*, &c.

‡ Herstlet's *Treaties*, XIII., 662.

§ *The Times*, October 8th, 1881.

exercise certain territorial and other rights somewhat similar to those formerly exercised by the East Indian and Hudson Bay Companies. Spain claiming suzerainty over North Borneo by reason of a Treaty with the Sultan of the Sooloo Archipelago, a question was raised in the Spanish Cortes as to the right of the Sultans of Brunei and Sooloo to make over their jurisdiction to the Company on the grounds that such a transaction would be in contravention of the rights of Spain as Suzerain.

In considering the subject of Suzerainty with reference to particular instances, it must be remembered that the status of a vassal State is liable to apparent modification hardly to be reconciled with any principle deduced from theory. Foreign interests, national instincts, the increase in strength of the vassal, the decrease in power of the suzerain State may, for a time, lead to the assumption on the part of vassal or of the suzerain of rights not theoretically possessed by it. On the whole, however, the principles herein suggested appear to be borne out not alone by theoretic deduction, but also by the practice obtaining among nations, and if and so far as the practice in any particular case may appear to be not in unison with the theory, it will be found on further examination that the practice is temporary and peculiar, or otherwise abnormal, and in no wise disproves the truth of the deduced theory.

Briefly recapitulating the results obtained from the consideration both of practice and principle, it will appear that vassal States are of two distinct classes, nominal and real, that from both classes is due to the suzerain certain feudal duties; that these duties in no way interfere with or modify the exercise of the rights possessed by the vassal State; that these rights include, in the case of nominal vassalage, both all external and all internal rights, by reason of the nominal vassal being in every way sovereign; that in the

case of real vassalage (the class including every vassal State lacking a single sovereign right), the rights, by reason of the non-sovereignty of the vassal, include none that are exterior, and only those interior rights which are expressly granted by the suzerain, and that the special duties engendered by the peculiar relationship are on the part of the vassal, fidelity, service, and respect, and on the part of the suzerain, the obligation to protect and defend the vassal, the duties being correlative and mutual.

CHARLES STUBBS.

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#### V.—CRIMINAL STATISTICS, 1898 \*

MR. TROUP in presenting the volume of Criminal Statistics for 1898, expresses regret that it was not ready before the end of 1899, but consoles himself with the reflection that at any rate the English and Scottish Criminal Statistics are published much earlier than those of any other country. The broad results of the figures are stated and the probable deductions to be drawn from them very ably, and impartially considered by Mr. Troup in his introduction; some interesting Maps and Diagrams are appended which show to the eye the increase and decrease of crime during a series of years, and also the geographical distribution of crimes and drunkenness. The first question, and the most important one naturally asked is, Has crime decreased or increased, both absolutely, and relatively to the population? As regards the offenders tried by the superior courts, although the number for the last three years has been almost the same, there is a marked diminution in the course of the last ten years, the number having declined by something over 2,000. Of course, this does not

\* Judicial Statistics, England and Wales, 1897. Part I.—Criminal Statistics Edited by C. E. Troup. London: Eyre and Spottiswoode, 1900.

necessarily mean an actual decrease in persons tried, to the same extent, as it is partly due to the extension of the powers of the courts of summary jurisdiction. This decrease will probably be still more marked in the future, when the operation of the Summary Jurisdiction Act 1899 begins to make itself apparent; as this Act must considerably reduce the number of persons tried before the superior courts, though it may, and probably will, increase the number of persons prosecuted on the whole, as no doubt offenders now escape owing to the reluctance of prosecutors to appear at Assizes or Sessions. The number of cases tried at the Assizes has diminished, and the number tried at Sessions increased by about the same number, and this can be almost entirely accounted for by the operation of the Burglary Act of 1896, which has transferred so many cases of burglary from the Assizes to Sessions. It is worth noticing here that the Revd. W. D. Morrison has fallen into an error in the figures in his thoughtful article on "Corporal Punishment" in the last number of this periodical. He there states that, "in 1897, out of the whole population of England and Wales only 156 offenders were convicted of burglary." He has been led into this mistake by referring only to the Assize statistics, where indeed there do appear only 156 convictions for burglary, but if he had turned to the statistics of Quarter Sessions, he would have found 263 more convictions, making a total of 419. In the number of indictable offences tried summarily, there is also a marked decrease in the last ten years; and all this, it must be remembered, has taken place, in spite of the passing of Acts creating new indictable offences, such as the Criminal Law Amendment Act. But for the purpose of thoroughly considering this question, it is better to follow Mr. Troup's example, and to take all offences which may be fairly classed under the heads of crimes, by adding to the indictable offences the more

serious of the non-indictable offences. On this basis Mr. Troup has prepared a most interesting table giving a general view of crime from 1858-98 at intervals of five years. From this it appears that in 1858 the number was 172,882, which rose in 1868 to 195,402, and has since, with some fluctuations, decreased, till in 1898 the number was 158,924. It must be remembered, too, that this has taken place in spite of an increase in the population, which makes the proportion of offences per 100,000 of the population decline from 887·9 in 1858 to 505·9 in 1898. The increase in the numbers and improvement in the training of the police, also render it most probable that a larger percentage of offenders are now prosecuted, so that on the whole these figures, in spite of the probability of there being an increased reluctance on the part of the public to prosecute—a factor which it is impossible to estimate in figures—really show that there is less crime in the country absolutely, and still less relatively. From one point of view, the fact which is also pointed out, that owing to the short sentences now passed the crimes committed are the work of a smaller number of criminals than formerly, is satisfactory as showing that their number is diminishing. It can, however, hardly be quoted as an argument in favour of short sentences, that the examination of the calendars of Cheshire, Warwickshire, and Staffordshire shows a proportion of recent previous convictions to persons convicted of 64 per cent. in 1898, as against 32 per cent. in 1878, and that from 1893 to 1898 the proportion of persons tried at Assizes and Quarter Sessions, having previous convictions, has increased from 55 per cent. to 60 per cent. It must be borne in mind in estimating the actual amount of alleged crime both that the numbers given are of offenders tried, and that in many cases more than one charge is contained in the same indictment, and that in no less than 1,584 cases there were additional

indictments charging other separate offences, though no doubt in a large number of cases the charge was based on the same facts looked at from a different legal point of view.

Having come to the conclusion that crime is on the whole diminishing, the next questions which are of the most interest to us are (1) what particular forms of crime are either increasing or diminishing, (2) what proportion of the criminals are juveniles. On the first point, the offences in which there seem to be the greatest decline are Crimes against the Person with violence, and Crimes against Property without violence. The latter were 67,649 in 1883 and 55,693 in 1898; the former were 97,405 in 1873 83,995 in 1883, and 78,087 in 1898. We have found it impossible to account in any way for the fluctuations from time to time in the numbers of particular crimes committed, and have been unable to trace them to any economic causes; but the idea which is sometimes expressed, that high wages produce a plentiful crop of crimes of violence, would not seem to be justified. Nor does another theory which we have heard expressed: that the spread of education, while reducing the number of ordinary larcenies, etc., has made up for it by increasing the number of frauds, seem to be any better founded; as since the passing of the Elementary Education Act, 1870, the number of persons convicted of forgery is fairly constant. Attempts at suicide show a marked increase, which is probably accounted for by the unfortunate increase in the prevalence of mental disease. Offences against morals also show an increase, but this is evidently attributable to the passing of the Criminal Law Amendment Act, 1885, after which the numbers at once jumped up. The question of the age of the persons convicted of indictable offences is a very interesting one, and it appears that although the number of youthful offenders has



diminished, yet it still bears the same ratio to the total of criminals. It is interesting to know how many of the offenders convicted have been previously in Reformatories. This does not appear in the Statistics as to Convictions, but it is stated among the Prison Returns that out of 159,680 convicted prisoners received in the year, 697 had been previously detained in Reformatory Schools, as against 1,246 offenders committed to them during the same year.

Of the persons convicted at assizes and quarter sessions, out of 9,133, 1,080 were females, their largest ratio to males, when there were no special causes tending to make the sex peculiarly subject to the crime, being in cases of attempting suicide, where they numbered 45 to 96. In the cases of indictable offences tried summarily the proportion is rather larger, there being 6,212 women to 26,624 males; the offence in which their ratio is the largest is that of receiving stolen goods, where they figure 158 times as against 287 males. The proportion of acquittals is rather smaller than in former years, the proportion of convictions among persons sent for trial at assizes and quarter sessions being 79·7, there having been a small but steady increase in the percentage almost every year since 1889. It is unluckily impossible to arrive at any sort of certain conclusion as to whether this increase is due to the influence of the Criminal Evidence Act, 1898, but perhaps in future years it may be possible to form some idea as to the effect prisoners giving evidence has had on the number of convictions, though it will have to be remembered that even before the passing of that Act there were several charges under which the defendant could give evidence on his own behalf. It is rather interesting to compare the table giving proportion of acquittals with another which \* gives the proportion of convicted persons who pleaded guilty. One might imagine that under the offences where

there the smallest proportion of acquittals there would also be the largest number of pleas of guilty, and *vice versa*, but this is by no means always the case. For although under the heading of "Offences against the Person," where the proportion of acquittals is the highest, the percentage of pleas of guilty is the lowest, yet under "Offences against Property with Violence" where the percentage of acquittals is the lowest, the percentage of pleas of guilty is not so high as in "Offences against Property without Violence." As might be expected the pleas of guilty are least frequent in cases of serious personal injury. Of course the number of cases of some offences is too small to make the percentage of any value, but out of no less than 141 persons convicted of attempted suicide, 88.65 per cent. pleaded guilty. The percentage of pleas of guilty is also very large in cases of Forgery, &c., and Larceny by a Servant, being 72.28 in the one case and 68.50 in the other, although the respective proportions of acquittals in the two classes are 8.60 to 21.12.

Of hardly less importance than the question of the increase or diminution of criminality, is the question of the activity and success of the police in dealing with it. The number of indictable offences becoming known to the police was 82,426. For these offences about 60,700 persons were proceeded against. It is instructive to note the proportions of success in different cases. For 354 cases of robbery with violence 458 persons were apprehended, these crimes being constantly committed by more than one person, although, under the whole class of offences against property with violence, in which there were 8,768 cases, the police could only take proceedings in a little over 2,900. For 3,867 offences against the person 3,824 persons were proceeded against, but for 66,317 offences against property without violence 50,748 persons were proceeded against.

There are a good many interesting points to notice about summary proceedings, excluding those for indictable offences. The first point to remark is, that there is a very decided increase in their number of no less than nearly 47,000 over the figures for 1897, which themselves show an increase of nearly 30,000 over the preceding year. But these figures are not so serious as they seem, for on comparing the numbers of the more serious offences which have been before included with indictable ones, to make up the general grand total of crimes, we find that, in almost every instance, there is a decrease in 1898. It is evident, then, that the increase in offences is in drunkenness, and offences against municipal or police regulations and in the offences created by the numerous Statutes of recent years. Drunkenness, we regret to see, has increased by 9,000, though we do not know whether part of this may not have resulted from increased strictness on the part of the police. Offences against the Elementary Education Acts have increased nearly 8,000, but, in spite of that, the average for the last five years is about 12,500 lower than the preceding similar period, and also lower than in any of the preceding periods during the last twenty years. It is not surprising to find a large increase in the offences relating to dogs, and there is an increase of over 7,000 in offences against police regulations, and the offences against the Highway Acts show an increase of about 1,600. The increase in these offences has been very marked in the last five years, the average for the last quinquennial period being 32,980, while for the previous period it was only 20,667. We should imagine that a very large proportion of this increase has resulted from the vagaries of cyclists. There are a great many other interesting subjects which are discussed and have their statistics tabulated in this volume, such as inquests, the prison returns, etc., but space does not permit us to

dwell on them, and we can only conclude by expressing our satisfaction at the decline in serious crime which seems to be proved by those tables, and our hope that this improvement may be shown to continue when Mr. Troup next makes public the fruits of his arduous labours.

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## VI.—THE "LIMITED LIABILITY" OF LANDLORDS.

IT has been truly said that the laws and usages regulating the tenure of land in England are unique. The system is commonly designated feudal, but this statement is far from correct, since there are still in force many local customs and rights in respect of the holding of land, which date back to a period long prior to any feudal system, and when private property, at least as we are accustomed to regard it, was but in its infancy. Our system of landed property is so complex and multiform that even few accomplished lawyers are well versed in the technicalities of the law of real property, and while this very complication calls for amendment, it is said to be simultaneously the chief obstacle in the way of effecting any radical improvement. The whole system of land tenure is the result not of deliberate legislation, but is a "series of historical accidents only intelligible in the light of historical conditions." Consequently, when anyone suggests that the time is ripe for the abrogation or amendment of what may be called out-of-date law, one is met with the profound learning of the real property specialist that you either do not understand the subject or wish to sap the very foundations upon which the whole superstructure rests. The evil may be admitted, its removal or remedy will be denied.

And this resistance is carried to a ridiculous and inconsistent extreme. So that even where the relation is purely one of contract—as it is in the case of landlord and tenant

—in which there is no question of feudalism, and where one would suppose the application of the laws affecting *ownership* in the land would not be necessary, we find ourselves, more or less, entangled in the meshes of the law of real property. And, perhaps, one of the causes of all the trouble that follows upon the relationship of landlord and tenant is the fact that leaseholds have always been regarded on the one hand as not being real property (although termed chattels *real*), and on the other hand, have never been frankly claimed as purely personal property.

Yet it has been declared that the bottom of all the differences between freeholds and leaseholds consists in the idea of the latter being wholly a matter of contract. A lessee's interest is not subject to feudal modes of transfer, nor to the feudal rules of inheritance; and the *custom* of generally creating it by deed has only become a *legal* requirement by modern enactments; while in case of the lessee's intestacy his lease-interest has always gone to his personal representative as part of "the personal estate" to be administered by the same rules as movable property.

When it is seen that the tendency of modern legislation has been to assimilate more and more the modes of transfer of real property to those of personal property, when it has been found necessary not only to redress the grievances under which agricultural tenants suffered, but also expressly to enact that in letting premises (of a certain value) for habitation by persons of the working classes a condition of fitness for that purpose shall be implied; and when there is at the present moment a Bill before Parliament with the object of further redressing the grievances of tenants of agricultural holdings, it may not be thought altogether inappropriate to discuss the desirability of amending the law of landlord and tenant in some particular respects. The writer wishes here to confine himself to two

definite and settled points of law with regard to the letting of houses, namely, the questions of (1) habitability at the commencement and throughout the term, and (2) damage arising through defect in, or dilapidation of the premises. As the law stands at present, independently of express warranty, condition, or covenant, a landlord who lets a house for purposes of habitation is:—

(1) Not liable for its condition, whether ruinous, dangerous, or otherwise unfit for domestic use.

(2) Not liable for any damage suffered by the tenant to his person or goods, or to any one who enters the house at the invitation of the tenant.

With regard to the first point, the law has been stated clearly and repeatedly.

Let us look at the language of some of these authorities.

In *Hart v. Windsor* (1843, 12 M. & W. 68) in answer to a claim for rent it was pleaded that the premises were not fit for habitation, by reason of their being infested with vermin.

Parke, B., in his judgment (p. 85 *et seq.*) says:—

"The simple question is, what is the implied obligation on the part of the landlord to his tenant, under a lease of a house for years?

"There is no authority for saying that these words ('demise,' and 'let') imply a contract for any particular state of the property at the time of the demise; and there are many, which clearly show that there is no implied contract that the property shall *continue* fit for the purpose for which it is demised; as the tenant can neither maintain an action, nor is he exonerated from the payment of rent, if the house demised is blown down, or destroyed by fire; or gained upon by the sea; or the occupation rendered impracticable by the King's enemies; or where a wharf demised was swept away by the Thames. In all these cases, the estate of the lessor continues, and that is all the lessor impliedly warrants. . . . We are all of the opinion that there is no contract, still less a

condition, implied by law on the demise of real property only, that it is fit for the purpose for which it is let. The principles of the common law do not warrant such a position; and though, in the case of a dwelling-house taken for habitation, there is no apparent injustice in inferring a contract of this nature, the same rule must apply to land taken for other purposes—for building upon, or for cultivation; and there would be no limit to the inconvenience which would ensue. It is much better to leave parties in every case to protect their interests themselves, by proper stipulations, and if they really mean a lease to be void by reason of any unfitness in the subject for the purpose intended, they should express that meaning."

Judgment upon the same basis and to the same effect, with regard to a demise of land for pasturing cattle, was pronounced in the case of *Sutton v. Temple* ([1843.] 12 M. & W. 52). And these are the two leading authorities upon the subject of fitness at the *commencement* of the letting.

Now, what is the ground upon which these judgments proceed? Shortly this, it has never been held that a landlord is liable, therefore he is not liable—which is no *reason* at all. It is true the learned judge thought there might be "no apparent injustice" in implying a warranty of fitness in the case of a *dwelling-house*; but he speedily repents that lapse into common-sense by suggesting that that would be but the thin edge of the wedge, and would be (with reason, surely) applied to the letting of land, and then where would it end. His obvious answer is, in inconvenience, which may be admitted. It might be inconvenient to the landlord, or lessor, that he should have thrown back upon his hands property which is worthless to the tenant or lessee, and which the latter would never have taken had he known its condition—inconvenient, clearly, but not unjust. It might be inconvenient for the landlord, or lessor, to have to pay damages for a breach of implied warranty that his field was fit for being depastured by cattle, whereas it contained poisonous refuse

paint which killed the cattle—inconvenient, but not unjust, nor unreasonable.

It is considered neither unjust nor unreasonable that a person who lets a carriage to hire should be called upon to compensate the hirer for injury sustained in consequence of the carriage breaking down. It is not held to be unjust that goods sold for human consumption should be impliedly warranted fit for that purpose. But it is argued that before taking a farm or house the intending tenant should go and see the state it is in (*Erskine v. Adcane*. [1873.] 42 L. J. Ch. 835), and if he neglect to do so he must still take it as he finds it; although, if land, it be manured with poisonous substance, or not free from noxious plants; and although, if a house, it may be ruinous, uninhabitable, or dangerous.\* True, it is reasonable that the intending tenant should inspect, but does that answer all? There are many things which render a house unfit for habitation, or grossly inconvenient and uncomfortable, but which are not visible or apparent upon inspection. No one may always tell whether the roof is water-tight, or secure by a mere casual inspection. A house needs to be dwelt in in order to discover whether it is inhabitable. You may inspect immediately after ceilings have been whitewashed, walls papered, and slates repaired—it needs an attack of wind and rain to test the tightness and security of a roof. One does not wait for these before inspecting or entering. The storm comes afterwards. But *why* should it be more incumbent upon a tenant previously to inspect a house admittedly let and intended for habitation, than for the hirer of a ship to inspect it before putting out to sea? The law says the ship must be seaworthy. Again, it is said in the judgment of *Hart v. Windsor*, it is best to leave the parties to make express terms. Which means, why not ask the landlord expressly

\* *Hart v. Windsor*, *supra*; *Keates v. E. Cadogan*, [1851.] 20 L. J. C. P. 76  
*Bartram v. Aldous*, [1886.] 2 T. L. R. 237.



to warrant? The answer is, he is human like the rest of us and does not *wish* to bind himself to anything (except the rent), and immediately the question is put he thinks you an "undesirable" tenant and refuses to contract.

The land is in the hands of the landowners, and the landless man has to live somewhere. A dwelling-house is a necessity, the hiring of which he cannot afford to dally with or delay in obtaining. And, surely, "fitness for habitation" ought not in reason to be left to an express warranty or stipulation, any more than "fitness for human food." Why should it all be in favour of the landlord and to the frequent loss and inconvenience of the tenant? The answer is one given with all the ostentation of profound learning and incomparable nonsense. It is this, the house is the subject of real property, the letting is of a *chattel real*! There is the clue to the mystery.

If the purchaser of a pound of butter or a joint of beef suffers in direct consequence of the said goods not being fit for food, he has his remedy against even an *innocent* vendor, but if a tenant enters and his goods are spoilt next day by rain and ceiling falling upon them owing to a leaky roof, he must bear it bravely. He ought to have tapped every slate before he took the house, or he ought to have expressly agreed with the landlord that in such event the landlord would compensate him for the damage. For is not the house real property?

But it will be said that not all goods sold are subject to an implied warranty of "fitness for purpose." Truly not but in many instances the same goods have a variety of uses, and it would be manifestly unfair to impose upon each vendor the duty of warranting their fitness for a purpose unknown to him. But in so far as goods are manifestly required for a specific purpose, the tendency of the law is to import a warranty as to their fitness therefor; in so far as the law does not do so, it is submitted that such defect

or inconsistency is not an argument against importing a warranty of "fitness for habitation" into every letting of a house intended for dwelling in, but rather a matter which calls urgently for amendment.

The general rule of law being such that there is no implied warranty as to fitness of a house for habitation, it is strange to read that an exception is made when the letting is of the same house *plus* the furniture in it. That is to say, in letting a furnished house, the lessor impliedly warrants and promises that the house and furniture are fit for occupation. So it was held in *Smith v. Marrable* ([1843] 11. M. & W. 5), in which case a tenant for five or six weeks was held justified in quitting without notice, because the house was infested with bugs. The distinction between a furnished and unfurnished house was not expressly drawn in this case, though the term "ready furnished" is used by Lord Abinger, who says that "no authorities are wanted, and that the case is one which common sense alone enables us to decide." The other three judges made no allusion to the house being furnished, but based their judgment upon two cases (*Edwards v. Ethrington*, [1825.] Ry. & M. 268; *Collins v. Barrow*, [1831.] 1. M. & Rob. 112, subsequently overruled) and upon the general principle that if the demised premises are incumbered with a nuisance of so serious a nature, *e.g.*, unsafe and dilapidated walls, improper sewerage, that no person can reasonably be expected to live in them, the tenant should be at liberty to throw them up, because the landlord should be taken to let them in a habitable state.

The decision in *Smith v. Marrable* was approved of in the later case of *Wilson v. Finch-Hatton* ([1877], L.R. 2 Ex. D. 336), where the principle was held applicable to defective drainage, and since has been applied to a case of infection by measles (*Bird v. Lord Greville* [1884], 1. C. & E. 317). Nor is it any excuse on the part of the landlord that he honestly

believed the furnished house to be habitable if it is found as a fact that it is not so (*Charsley v. Jones*, [1889], 53, J. P. 280).

In *Wilson v. Finch-Hatton*, Kelly, C.B., seems to have based his judgment partly upon the brevity of the tenancy of a furnished house, and Bacon, V.C. (in *Powell v. Chester*, [1885], 52, L. T. 723), stated that shortness of term was the only ground and authority for the decision in *Smith v. Marrable*. But it has rightly been submitted that duration has nothing to do with the distinction (see *Hart v. Windsor*; *Sutton v. Temple*), which is really based upon common sense, although, no doubt, the premises being furnished and the landlord receiving a much higher rent in consequence, may have unconsciously played some part in producing the first judgment upon the subject. It has been further suggested that the distinction should have been held good, if for no other reason than that an unfurnished house is more easily inspected than a furnished house. But the contrary was inferred in *Sutton v. Temple*, and the answer is obvious, namely, that the warranty is implied whether you inspect or not; and there are, as pointed out above, many defects not open to superficial inspection, and not discoverable till rain or time reveal them. Probably, as previously observed, the mysterious difference in the application of rules of common sense is due to the artificial distinction between real and personal property.

There are two further points to notice with regard to this exception in favour of furnished houses or apartments. The exception does not apply to the letting of a house only *partly* furnished (*Powell v. Chester*), but no reason for such restriction is given, which is purely arbitrary. And further, it has been held that the implied warranty as to the letting of furnished houses only applies to the condition of the premises at the *commencement* of the

term (*Maclean v. Currie*, [1884.] C.&E. 361; *Sarson v. Roberts*, [1895], 2 Q. B. 395). It was said in the latter case that to extend this warranty so as to make it apply to the condition of the house during the whole of the tenancy would not be reasonable. The landlord, knowing the purpose for which the tenant is hiring the house, must be taken to warrant its being reasonably fit for such purpose at the time of letting; but, it is said, to go beyond that would be to put the landlord in a different position—for he might be at a distance and know nothing of its state, and the conditions might arise through causes wholly unknown to him, and beyond his control. Was ever an argument more at a loss for reason? What has the landlord's absence or presence, knowledge or ignorance of condition to do with it?

According to this reasoning, the warranty comes to this. If a furnished house becomes uninhabitable at the end of the first week of the tenancy through some cause not actually existing at the first day of the tenancy, then the tenant can neither quit the premises and refuse to pay rent, nor have a right of action for any damage through injury sustained, or expense incurred. No action, no remedy, no relief. If the same principle and argument were applied to an ocean-bound vessel what absurdities would appear. Observe, it might be said the ship-owner only warrants the condition of the ship as being seaworthy *when it leaves port*; if anything should get loose and give way in mid-ocean, he cannot be responsible for that. Why not? Because he may be (and very probably is) too far away and unable to inspect it, or know anything about it; it might be wholly beyond his control. Suppose a vendor of food says to a dissatisfied purchaser, the goods were fit when you bought them an hour ago; I cannot help the fresh air working upon them and making them unfit an hour later. You should have eaten them all

at once, and not kept them for an hour. The hirer of a trap complains, in the middle of the hiring, that the trap has suddenly collapsed—and is met with the answer, it was all right when it was first hired, and that the hirer could not expect the owner to be running about with him to see if it was still sound during the whole of the term of hiring.

Yet, equally ridiculous is this suggestion that the landlord's liability is restricted to the initial condition of the premises. The premises are required to be fit for habitation the *whole* of the term during which they are used for that purpose, and not for mere fractions of the term.

Indeed, it may be submitted that the right view of every letting of dwelling-houses is that incidentally expressed in *Sutton v. Temple* (p. 60):—"If a carriage be let for hire, and it breaks down on the journey, the letter of it is liable, and not the party who hires it. So, if a party hire anything else of the nature of goods and chattels, can it be said that he is not to be furnished with proper goods—such as are fit to be used for the purpose intended? Undoubtedly the party furnishing the goods is bound to furnish that which is fit to be used. In every point of view the nature of the contract is such that an obligation is imposed upon the party letting for hire to furnish that which is proper for the hirer's accommodation. It is manifest from cases of everyday occurrence that such is the law. . . . Common sense and common justice concur in that conclusion."

For the benefit of a particular class of people, an amendment to the common law has been found "expedient" and necessary with regard to the letting and hiring of small unfurnished tenements.

The enactment was first instituted in 1885 by a statute.

entitled "The Housing of the Working Classes Act," which was in part repealed by a consolidating and amending Act in 1890, but this latter statute, by sec. 75, re-enacted one section (sec. 14) of the former Act, which runs in the following terms:—

"In any contract made after the 14th day of August, 1885, for letting for habitation by persons of the working classes a house or part of a house, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation. In this section the expression 'letting for habitation by persons of the working classes' means the letting for habitation of a house or part of a house at a rent not exceeding in England the sum named as the limit for the composition of rates by sec. 3 of the Poor Rate Assessment and Collection Act, 1869, and in Scotland or Ireland £4."

This works out at a rent limited in London to £20, in Liverpool £13, in Manchester or Birmingham £10, and elsewhere in England £8.

The smallest concessions to common sense are always acceptable; it is a proper thing that the poorest people should have some amelioration to their otherwise hard lot.

But *why* the condition implied in their favour should be withheld from the rest of the community is a question hopelessly without a reasonable answer. It is but one of the many instances of the patch-work, partial way in which we legislate.

So much for the matter of condition, &c., of the premises. Arising out of this is the subject of general repairs, and that of rebuilding or re-instating the premises in case of destruction or partial demolition by fire, flood, storm or other similar events wholly beyond the control of either party, and in no way attributable to misconduct by the tenant. There is an implied obligation at common law

on the part of the tenant to do proper repairs ; to keep the premises wind and water tight. The curious fact is that a tenant is impliedly obliged to keep a house in repair (which it is submitted should be impliedly the landlord's duty), but the tenant is *not* liable, apart from express agreement, for mere wear and tear of the premises (*Torriano v. Young*. [1833.] 6 C. & P. 8).

And while the tenant is not liable to rebuild in case of destruction by fire, flood, &c., neither is the landlord—but the tenant is obliged to go on paying his rent although the subject-matter of his contract has ceased to exist, independently of his conduct. Of course, it will be said he may insure against fire, and perhaps against some other probable causes of destruction, and he may expressly contract himself out of liability to continue paying rent during the time he may be out of occupation, which is true. But the point is that independently of this express contract, his obligation continues—and it is submitted that this is contrary to common sense, and the principles of the ordinary law of contract.

It is equally unreasonable that where a landlord covenants to do repairs and does not do them, the tenant cannot refuse to pay his rent, nor can he do the repairs himself and deduct the amount from his rent, nor may he throw up the premises and contract ; but he is generally driven to his action on the covenant, during the process of which he and his family are obliged to suffer the inconvenience usually resulting from dilapidation or disrepair.

It is needless to pursue this subject to any greater length or into any further details.

Reaching down from a time when things were arbitrarily done, without rhyme or reason, to our own times when, with the enormous populations of our towns, individuals are more and more in the hands of the holders of the land, and owners of the houses built thereon, it

becomes yearly more urgent that an equitable and common-sense view should be taken of the contract of hiring houses for human habitation, that the principles applicable to the hire of goods and chattels personal, should be applied to the hire of a house, and that the implied warranty imported into the letting of a furnished house be extended to the letting of all houses, whether furnished or unfurnished, when let for dwelling purposes.

If it is too late to revive the law as laid down in *Edwards v. Etherington*, and *Collins v. Barrow*, it is time the principle applied by the legislature to the dwellings of the working classes be extended to the whole of the community of tenants, irrespectively of position or mode of obtaining a living.

The second point needs to be touched upon but lightly, for much the same line of argument applies.

The rule of law is that the occupier and not the owner of premises is liable, primarily, for damages resulting from a nuisance, or for injuries to third persons or adjoining property, through the same being in a ruinous or dangerous condition; and that is so, although as between himself and the landlord, the tenant may not be liable to repair.\*

And it would appear that there are only two ways in which a landlord can be held liable for injury to a stranger by the defective state of the premises let to a tenant, namely, where he has contracted with the tenant to repair, or when he has let the premises in a ruinous and improper condition.†

But a landlord, by letting premises in a ruinous condition, does not become liable for any damage to the tenant or his guests or customers.‡

\* *Coupland v. Hardingham*. [1813.] 3. Camp, 398; *Russell v. Shenton*. [1842]. 3. Q.B., 449; *Reg v. Watson*. 2. Ld. Raym, 856.

† *Nelson v. Liverpool Brewery Co.* [1877.] 2. C.P.D., 311; *Payne v. Rogers*. [1794]. 2. H.Bl., 349; *Gwinnett v. Eamer*. [1875.] 32. L.T.N.S., 835.

‡ *Robbins v. Jones*. [1863.] 15. C.B.N.S., 240; *Norris v. Catmur*. [1885] C. & E. 576.



It may be said that making the occupier of premises primarily liable to a stranger for damages sustained by reason of some defective or dangerous part of the premises is the swiftest way of dealing with the matter, because if the landlord is liable the defendant occupier will speedily join him in the action, or otherwise bring him to book. But such a suggestion merely avoids the real issue which is that only the negligent or tortiously responsible party ought to be sued in the first instance. Of course, according to the arbitrary principles applied to the duty of repairing, the *tenant* would be deemed to be the negligent party. The writer, however, submits that that is a further argument in favour of casting upon the landlord the implied responsibility of putting the premises into a fit and thorough condition. For it is unjust that a person who is not negligent in doing repairs, &c., should be suddenly called upon by a stranger for compensation in respect of injuries which were caused, for example, through some structural defect or fault.

Why should not the general principle applicable in torts be applied to the landlord, namely, that the owner of a dangerous thing or animal must protect the public from harm by it at his peril. What applies to a reservoir of water, or to the keeping of a monkey, or to the carrying of fire-arms in the open street, &c., or the duty imposed upon the owner of an empty house should apply equally to the owner of the house when it happens to be let.

It would be absurd to reply that the owner should not be liable merely on the ground that he has no implied right to enter the premises in order to effect repairs; for if there were an implied *duty* to repair, &c., it would involve a right, of necessity, to enter at reasonable times for that purpose.

On the other hand, it is as at present manifestly unfair that a tenant should be held responsible in damages for accident unavoidable by him.

Such is the position of the tenant in relation to strangers. With regard to a tenant's inability to recover from the landlord damages for personal injuries, or injuries to his goods through a falling ceiling, inflow of water, dampness due to imperfect structure, &c., &c., it has already been submitted that the present law is bad and calls for amendment. And since a tenant's family, guests, and customers are deemed, in point of law, to be all identified with the tenant, and the tenant himself for most purposes the representative of the landlord, there is a curious, logical inconsistency in the non-liability of the landlord for injuries to any of these. For might not the comedy of errors be completed in applying to their case the maxim *Volenti non fit injuria*?

For the reasons above stated it is submitted that the landlord should be held impliedly to warrant fitness for habitation during the whole of the hiring, and, in consequence, to be liable for damage resulting from every cause directly attributable to the condition of the premises, not due to any omission or act on the part of the tenant.

WALTER R. WARREN.

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#### VII.—REGINA v. GRAY.

NO one would be disposed to attempt any defence, from the standpoint of decency and good taste, of the language used with reference to Mr. Justice Darling, which gave rise to the proceedings, in the early part of the year, for the committal of the editor of a Birmingham newspaper. But when the power of the Court is invoked to punish it as a contempt of Court, a serious constitutional question arises, as to the extent and limit of this summary jurisdiction. No case can be found where it has been previously exercised to punish a purely personal

attack on a judge. And although the opinion of Chief Justice Wilmot in Almon's case was relied on as an authority, yet not only does that case differ from the present one, in that the attack was there directed against the propriety of an order made, and that the matter arose at a period, prior to Fox's Libel Act, when the judges had usurped to themselves the function of deciding whether a publication was a libel or not, but every line of that learned and admirable opinion shows that the jurisdiction does not extend to such a case as the present one.

In Almon's case Lord Mansfield had made a certain order in chambers. One of the objections raised to the jurisdiction to issue a committal was that the order having been made in chambers, it could not be enforced without first being made a rule of court, and that, therefore, the libel complained of was not in reference to a proceeding *of the court*, and could not be punished as a contempt of court. Chief Justice Wilmot, in dealing with this argument, says :—" The question resolves itself at last into this single point, whether a judge, making an order at his house or chambers, is not acting in his judicial capacity as a judge of this court, and both his person and character under the same protection as if he was sitting by himself in court ? It is conceded that an act of violence upon his person when he was making such an order, would be a contempt punishable by attachment ; upon what principle ? For striking a judge in walking along the streets would not be a contempt of court. The reason, therefore, must be that he is *in the exercise of his office and discharging the function of a judge of this court* ; and if his person is under this protection, why should not his character be under the same protection ? It is not for the sake of the individual, but for the sake of the public that his person is under such protection ; and in respect of the public, the imputing corruption and the perversion of justice to him,

in an order made by him at his chambers, is attended with much more mischievous consequences than a blow ; and therefore the reason of proceeding in this summary manner applies with equal, if not superior, force to one case as well as the other ; there is no greater obstruction to the execution of justice from the striking a judge than from the abusing him, because his order lies open to be enforced or discharged, whether the judge is struck or abused for making it. The greatest objection upon this part of the case has been, that this Court will not enforce obedience to a judge's order, by an attachment, before it is made a rule of Court, and that the refusal to perform it must be subsequent to its being made a rule of Court, and from thence it has been inferred, that it can be no contempt of the Court to libel a judge for making an order, because it would be no contempt of the Court to disobey it. But, upon consideration, I think the inference is not a just one. The right of the Court to control these orders is to preserve a uniformity of practice, and to prevent any clashing which might arise from four distinct and separate exertions of the same jurisdiction. The refusing to issue an attachment for the breach of such an order, before it is made an order of the Court, was founded upon the same principle. We will not enforce obedience to it till we have adopted it ; but that provision only respects the effect of the order when made, and does not the least apply to the capacity or character in which the judge makes it. He is still opening and exercising the jurisdiction of the Court, and is doing the business which must otherwise be done in Court, exactly in the same manner as we do at the Side Bar ; and surely a libel upon the judges for what they do at the Side Bar, within a few yards of the Court, would be as much the object of an attachment as for anything done in Court. Custom legitimates the practice at Chambers, as much

as at the Side Bar; and custom may qualify and modify the acts they do in both places. But still they are emanations of judicial power, and whether they have more or less weight, they are acts done by the judge in the same capacity and character in which he sits here; and whether he is swearing an affidavit out of court, or pronouncing a solemn opinion in court, the reason of resenting the indignity is the same, and *ubi eadem est ratio ibi idem est jus*. . . . An attachment for a libel upon a judge for what he does at Chambers does not proceed upon any principle analogous to the case of a libel upon a bailiff, but falls directly upon the principle of libelling the court, which is imputing to the king a breach of that oath, which he takes at the coronation, to 'administer justice to his people;' and a judge at his Chambers is as much in the administration of that justice as when he is in court, though his acts have not the same efficacy as the acts of the whole court."

Chief Justice Wilmut, in the foregoing passages, clearly distinguishes between attacking a judge for acts done by him in the course of his duty as judge, and attacking him in reference to matters not pertaining to his official duties. What, then, was the object of the strictures upon Mr. Justice Darling? Not any exercise of judicial duty, but an assumption of the rôle of press censor—and that not on account of anything which had been done or was threatened, but because of a mere apprehension in the judge's own mind. In '*Reg v. Castro* (Skipworth's case) L.R. 9, Q.B. 230, Blackburn J. had this distinction in his mind when he said:—"The phrase 'Contempt of Court' often misleads persons not lawyers, and causes them to misapprehend its meaning, and to suppose that a proceeding for Contempt of Court amounts to some process taken for the purpose of vindicating the personal dignity of the judges, and protecting them from

personal insults as individuals. Very often it happens that contempt is committed by a personal attack on a judge or an insult offered to him ; but as far as their dignity as individuals is concerned, it is of very subordinate importance compared with the vindication of the dignity of the Court itself."

In a case which was the subject of a special reference from the Bahama Islands to the Privy Council, and is reported [1893] A.C. 138, a satirical criticism had been published of the Chief Justice, for which the Editor was committed. The Privy Council reported :—"That the letter signed 'Colonist' in the *Nassau Guardian*, though it might have been the subject of proceedings for libel, was not, in the circumstances, calculated to obstruct or interfere with the course of justice or the due administration of the law, and therefore did not constitute a contempt of Court." And in a more recent case, *McCord v. St. Aubyn* [1899] A.C. 561, the Privy Council lays it down that—"The power summarily to commit for contempt of Court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the judge as a person. He must resort to action for libel or criminal information. Committal for contempt of Court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice. Hence when a trial has taken place and the case is over, the judge or the jury are given over to criticism."

G. D. KEOGH.

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# VIII.—ASSUMPSIT FOR USE AND OCCUPATION.\*

**I**N an essay on the History of Assumpsit in the current volume of this REVIEW it is stated (p. 310) that *Indebitatus Assumpsit* for use and occupation was not allowed upon a quasi-contract, for special reasons connected with the nature of rent. To set forth briefly these reasons is the object of this *excursus*.

It is instructive to compare a lease for years, reserving a rent, with a sale of goods. In both cases, debt was originally the exclusive action for the recovery of the amount due. In neither case was the duty to pay conceived of as arising from a contract in the modern sense of the term. Debt for goods sold was a grant. Debt for rent was a reservation. About the middle of the sixteenth century *Assumpsit* was allowed upon an express promise to pay a precedent debt for goods sold; and in 1603 it was decided by Slade's case that the buyer's words of agreement, which had before operated only as a grant, imported also a promise, so that the seller might, without more, sue in debt or *Assumpsit*, at his option.†

Neither of these steps was taken by the courts in the case of rent. There is but one reported case of a successful *Indebitatus Assumpsit* for rent before the Statute 11 Geo. II. c. 19, § 14; and in that case the reporter adds: "Note, there was not any exception taken, that the *assumpsit* is to pay a sum for rent; which is a real and special duty, as strong as upon a speciality; and in such case this action lies not, without some other special cause of promise."‡ This note is confirmed by several cases in which the plaintiff failed upon such a count as well where there was a

\* Reprinted by permission from Vol. II, of the Harvard Law Review [1889].

† *Supra*, p. 149.

‡ Slack v. Bowsal (B. R. 1623), Cro. Jac. 668.

subsequent express promise\* as where there was no such promise.†

The chief motive for making *Assumpsit* concurrent with Debt for goods sold was the desire to evade the defendant's wager of law. This motive was wanting in the case of rent, for in debt for rent, wager of law was not permitted.‡ Again, although *Assumpsit* was the only remedy against the executor of a buyer or borrower, the executor of a lessee was chargeable in debt. These two facts seem amply to explain the refusal of the courts to allow an *Indebitatus Assumpsit* for rent.

But although the landlord was not permitted to proceed upon an *Indebitatus Assumpsit*, he acquired, after a time, the right to sue in certain cases, in special assumpsit, as well as in debt. This innovation originated in the King's Bench, which, having no jurisdiction by original writ in cases of debt, was naturally inclined to extend the scope of trespass on the case, of which *Assumpsit* was a branch. At first this court attempted to justify itself by construing certain agreements as not creating a rent. For example, in *Symcock v. Pryn*,§ the plaintiff declared that "in consideration that the plaintiff had let to the defendant certain land, the defendant promised to pay *pro firma predicta terre* at the year's end, £20." "All the court (*absente* Popham) held that the action was maintainable; for it is not a rent, but a sum in gross; for which he making a promise to pay it in consideration of the lease the action lies."|| This judg-

\* *Green v. Harrington* (C. B. 1619), 1 Roll. Ab. 8, pl. 5, Hob. 24, Hutt. 34, Brownl. 14, s. c.; *Munday v. Baily* (B. R. 1647), Al. 29, Anon. Sty. 53, s. c.; *Ayre v. Sils* (B. R. 1648), Sty. 131; *Shuttleworth v. Garrett* (B. R. 1688), Comb. 151, per Holt, C. J.

† *Reade v. Johnson* (C. B. 1591), Cro. El. 242, 1 Leon. 155, s. c.; *Neck v. Gubb* (B. R. 1617), 1 Vin. Ab. 271, pl. 1, 2; *Brett v. Read* (B. R. 1634), Cro. Car. 343, W. Jones, 329, s. c.

‡ *Reade v. Johnson*, 1 Leon. 155; *London v. Wood*, 12 Mod. 669, 681.

Cro. El. 756, Winch. 15, s. c. cited (1621).

|| See also *Neck v. Gubb* (1617), 1 Vin. Ab. 271, pl. 3; *Dartnal v. Morgan* (1620), Cro. Jac. 598.



ment was reversed in the Exchequer Chamber in accordance with earlier and later cases in the Common Bench.\*

In the reign of Charles I. the rule was established in the King's Bench that *Assumpsit* would lie concurrently with Debt, if, at the time of the lease, the lessee expressly promised to pay the rent. *Acton v. Symonds*† (1634) was the decisive case. The count was upon the defendant's promise to pay the rent in consideration that the plaintiff would demise a house to him for three years at a rent of £25 per annum. The court (except Croke, J.) agreed that if a lease for years be made rendering rent, an action on the case lies not upon the contract, as it would upon a personal contract for sale of a horse or other goods, but where there is an *assumpsit* in fact, besides the contract on the lease, an action on this *assumpsit* is maintainable. In the report in Rolle's Abridgment it is said: "The action lay, because it appeared that it was intended by the parties that a lease should be made and a rent reserved, and for better security of payment thereof that the lessor should have his remedy by action of debt upon the reservation, or action upon this collateral promise at his election, and this being the intent at the beginning, the making of the lease though real would not toll this collateral promise, as a man may covenant to accept a lease at a certain rent and to pay the rent according to the reservation, for they are two things, and so the promise of payment is a thing collateral to the reservation, which will continue though the lessee assign over." This doctrine was repeatedly recognised in the King's Bench;‡ it was adopted in the

\* *Clerk v. Palady* (1598), 10. El. 859; *White v. Shorte* (1614), 1 Roll. Ab. 7, pl. 4; *Ablain's Case* (1621), Winch, 15.

† *W. Jones*, 364, Cro. Car. 414, 1 Roll. Ab. 8, pl. 10, s. c.

‡ *Potter v. Fletcher* (1633), 1 Roll. Ab. 8, pl. 7; *Rowncevall v. Lane* (1633), 1 Roll. Ab. 8, pl. 8; *Luther v. Malyn* (1638), 1 Roll. Ab. 9, pl. 11; *Note* (1653), Sty. 400; *Lance v. Blackman* (1655), Sty. 463; *How v. Norton* (1666), 1 Sid. 279; 2 Keb. 8, 1 Lev. 279, s. c.; *Chapman v. Southwick* (1667), 1 Lev. 204, 1 Sid. 323, 2 Keb. 182, s. c.; *Freeman v. Bowman* (1667), 2 Keb. 291;

Exchequer in 1664,\* and was finally admitted by the Common Bench in *Johnson v. May*† (1683), where "because this had been *verata quastio* the court took time to deliver their opinion . . . and all four justices agreed that the action lay, for an express promise shall be intended, and not a bare promise in law arising upon the contract, which all agree will not lie."

In the cases thus far considered the *assumpsit* was for the payment of a sum certain. *Assumpsit* was also admissible where the amount to be recovered was uncertain, namely, where the defendant promised to pay a reasonable compensation for the use and occupation of land. Indeed, in such a case *Assumpsit* was the sole remedy, since Debt would not lie for a *quantum meruit*.‡

Such was the state of the law when the Statute 11 Geo. II. c. 19, s. 14, was passed, which reads as follows: "To obviate some difficulties that may at times occur in the recovery of rents, where demises are not by deed, it shall and may be lawful to and for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, and hereditaments held or occupied by the defendant in an action on the case for the use and occupation of what was so held and enjoyed; and if, in evidence on the trial of such action, any *parol* demise or agreement, not being by deed, whereon a certain rent was reserved, shall appear, the plaintiff shall not therefore be nonsuited, but may make use thereof as an evidence of the *quantum* of damages to be recovered."

*Stroud v. Hopkins* (1674), 3 Kcb. 357. See also *Falher v. Corbret* (1733), 2 Barnard, 386, but note the error of the reporter in calling the case an *Indebitatus Assumpsit*.

\* *Trever v. Roberts*, Hard. 366.

† 3 Lev. 150.

‡ *Mason v. Welland* (1685), Skin. 238, 242, 3 Mod. 73, s. c.; *How v. Norton* (1666), 1 Lev. 179, 2 Keb. 8, 1 Sid. 279, s. c. It is probable that a promise implied in fact was sufficient to support an *assumpsit* upon a *quantum meruit*. "It was allowed that an *assumpsit* lies for the value of shops hired without an express promise," per Holt, C. J. (1701), 1 Com. Dig., *assumpsit*, C, pl. 6.

The "difficulties" here referred to would seem to be two. If, before this statute, the plaintiff counted upon a *quantum meruit*, and the evidence disclosed a demise for a sum certain, he would be nonsuited for a variance. Secondly, if he declared for a sum certain, he must, as we have seen, prove an express promise at the time of the demise. The statute accomplished its purpose in both respects. But it is in the removal of the second of the difficulties mentioned that we find its chief significance. Thereby *Indebitatus Assumpsit* became concurrent with Debt upon all *parol* demises. In other words, the statute gave to the landlord, in 1738, what Slade's case gave to the seller of goods, the lender of money, or the employee, in 1603; namely, the right to sue in *Assumpsit* as well as in Debt, without proof of an independent express promise.

The other counts in *Indebitatus Assumpsit* being the creation of the courts, the judges found no great difficulty in gradually enlarging their scope, so as to include quasi-contracts, where the promise declared upon was a pure fiction. Thus, one who took another's money by fraud or trespass, was liable upon a count for money had and received; \* one who wrongfully compelled the plaintiff's servant to labour for him, was chargeable in *Assumpsit* for work and labour; † and one who converted the plaintiff's goods, must pay their value in an action for goods sold and delivered.‡

But *Indebitatus Assumpsit* for rent being of statutory origin, the courts could not, without too palpable a usurpation, extend the count to cases not within the Act of Par-

\* *Thomas v. Whip*, Bull. N. P. 130; *Tryon v. Baker*, 7 Lans. 511, 514.

† *Stockell v. Watkins*, 2 Gill & J. 326.

‡ The writer is indebted to Professor Keener for a correction of the statement that the count for goods sold and delivered was never allowed against a converter. See 2 Keener, *Cases on Quasi-Contracts*, 606, 607, n. 1; *Cooley Torts* (2 ed.), 109, 110; *Pomeroy, Remedies* (2 ed.), §§ 568, 569.

liament. The statute was plainly confined to cases where, by mutual agreement, the occupier of land was to pay either a defined or a reasonable compensation to the owner. Hence the impossibility of charging a trespasser in *assumpsit* for use and occupation.

JAMES BARR AMES.

## IX.—CURRENT NOTES ON INTERNATIONAL LAW.

### China.

A *resumé* of the treaties between Great Britain and China may be interesting at the present moment. In 1842 the treaty of Nanking allowed British subjects to trade in China, but only in specified ports which included Shanghai and Canton; and Hong Kong was ceded. A supplementary treaty in 1843 provided that British subjects should be on the most favoured nation footing. By the Bocca Tigris Convention of 1846, China agreed, on Great Britain evacuating Chusan, not to cede it to any other Power, and Great Britain undertook to protect Chusan in case of an attack by invasion. The Treaty of Tientsin in 1858 confirmed that of 1842, allowed Her Majesty to appoint consuls, and British subjects to travel for pleasure or trade in the interior, except at Peking, with passports, and certain other ports were opened to British trade and residence. British merchants were allowed to trade on the Upper Yangtse, and the British Government and its subjects were confirmed in their enjoyment of all privileges, immunities and advantages that may have been or may hereafter be granted by His Imperial Majesty to the Government or subjects of any other nation. In 1860, another treaty was signed at Peking, which recited that a breach of friendly relations had been caused by the act of

the garrison of Taku which had obstructed the British representative when on his way to Peking for the purpose of exchanging the ratifications of the treaty of Tientsin, and that the Emperor of China expressed his deep regret at the misunderstanding so occasioned (a painfully appropriate precedent for the next probable treaty): Tientsin was opened to trade, and Kowloon was ceded.

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By the Chefoo agreement of 1876 more ports were opened to trade, which have been lately augmented. Later an agreement was made as to the boundary between Burmah and Tibet. In 1886, in consequence of diplomatic correspondence with the Chinese Government on the subject of Corea, and after the Chinese Minister who was charged with the conduct of affairs between China and Corea, had communicated an assurance given to himself by the Russian *chargé d'affaires* at Peking, under instructions from his Government, to the effect that if the British occupation of Port Hamilton ceased, Russia would undertake not to interfere with Korea under any circumstances, Great Britain retired from Port Hamilton on the understanding that it should be recognised as part of the territory of Corea, the integrity of which was guaranteed by us. In 1898 an extension of Hong Kong territory was granted, and Wei-hai-Wei was leased to us for so long a time as Port Arthur was leased to Russia. Finally, in 1899, Great Britain and Russia mutually agreed not to interfere with each other in the respective spheres of the territory of the Great Wall and the Yangtse Valley, recognising the former as the Russian and the latter as the British sphere of influence.

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The treaties between China and other nations are to the same effect; and the policy of the "open door" is

only the maintenance of the equality of trading rights throughout China to which all the Powers are equally entitled. Under the strict terms of treaties no foreigners can have exclusive rights in any part of China; and there is already abundant proof that the policy of exclusive rights in defined spheres has been as unfortunate in its effect of irritating the Chinese as incorrect in international law.

### **Delagoa Railway Arbitration.**

The International Peace Bureau at Berne states the following facts as an explanation of the long delay which characterised the proceedings of the Delagoa Railway Arbitration, viz., the "cases" were not completed for three years: proofs were not filed till a year later; the commission of experts appointed in 1896, took four months to inspect and a year to write their report; a supplementary case consisting of questions and observations on this report was allowed to each side, and this led to a second report presented by the experts a year after the delivery of the first; the procedure was closed in May, 1899, and after attempts by the plaintiff to re-open the whole matter had been rejected by the Court, the decision was given in March of this year; and lastly two of the arbitrators were ill at times fixed for the sittings of the Court. This explanation, however, only emphasises the deliberateness of the proceedings, which seem to have been much more leisurely than there was any necessity for, especially in view of the amount of the award. Friends of arbitration as a means of settling International disputes will the more welcome the coming into force of the permanent system created at the Hague Conference, which, like the United States, the British Government is about to confirm by ratification.

### South Africa.

The war in South Africa continues to yield points of interest in international law. The reported proclamation by the British general that all inhabitants of the former Orange Free State found in arms after a certain time would be treated as rebels, and a similar report of a notice to the effect that all buildings situated within a certain distance of any point where attempts should be made to cut railway lines, shall be destroyed (which have produced a protest in the German Press,) have been declared by the British Government to be unknown to them. If such measures were in fact contemplated, it may be said by way of comment, that the legality of the latter depends on whether it is justified by military necessity; if it should be required for the purpose of protecting the British railway communications nothing can be said against it; and the Franco-German war supplies plenty of precedent. As regards the former it would seem that to justify it the conquest of the country must be complete, and in Hall's words, this requires not only the "intention to appropriate" (shown by a proclamation of annexation) but the "ability to keep, which is shown by conclusion of peace or the establishment of an equivalent state of things." Even after the military possession is complete, an appreciable period of time must by modern practice elapse before armed forces or the remains of them which have been enemies can be considered as rebels, though their warfare is only that of guerillas; and the oath of allegiance broken, perhaps owing to fear of or compulsion by fellow countrymen still in arms, does not seem enough to justify it. This consideration should especially prevail with our own Government, whose representative at the Hague Conference gave a special and earnest support to the right of the inhabitants of an invaded country, resisting by force the invading troops, to be treated

as belligerents though not part of the regular forces of the country.

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The annexation of the Orange Free State deprives it of its international position as a State ; and the effect of this remains to be seen, on the treaties existing between it and other countries, *e.g.*, its treaty with Germany in 1897, and with Belgium in 1894, and Cape Colony in 1889. This is a question generally for the latter to decide ; thus the United States treated its treaties with Algiers as annulled by the French occupation, and acted in the same way when Hanover was incorporated with Prussia ; and in the case of Texas, Great Britain held her to her engagements, and so with Tunis when occupied by France. In the present case, however, no doubt they will continue.

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Another question is the effect of annexation on the former State's public debts, and this is made especially prominent in the present case by the announcement that the British Government will pay the interest now due on the late Free State loan on the condition that there is no further liability on the capital or interest. There has been some diversity in international practice, where part of a defeated State is ceded to a victorious State, whether a corresponding portion of the former's public debt is transferred to the latter (see in this magazine 1899, p. 92) ; but there seems to be no precedent for a victorious State, which has absorbed its opponent, refusing to take over liabilities properly incurred on the latter's behalf and on its public credit. The reason for this proposition is that it is just and equitable that *bona-fide* creditors of a State ought not to have their rights injuriously affected by a change in its government, and the conqueror ought not to take the benefits of his conquest without undertaking the burdens



which have produced these benefits. No doubt, however, in the present case the creditors' rights will be satisfied.

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By conquest, Great Britain becomes entitled to all the public properties of the Boer States, and in this connection public notice has been given warning anyone against negotiating orders for payment of money given by the late Transvaal Government. The British Government has also in strictness the right to seize private property situate in the enemy's country, but this would only be done if found necessary in order to prevent improper claims being made by creditors of the late government.

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### Foreign Judgments.

The statutes of the Colony of Mauritius, passed in 1899, include one of considerable importance in private international law, viz., providing for the execution in Mauritius of judgments of foreign courts, whether pronounced by British or other tribunals, ordering the payment of a sum of money. It has long been a moot question in international law how to secure the recognition and enforcement in one country of judgments given by the courts of another; and the theory has not as yet been much recognised in international practice, except between a few nations by treaty, notably the recent Franco-Belgian treaty on this subject, although Italy recognises it in her code. The modern German code does not, however, show any favour to it, even to the extent of giving any recognition to the judgment of a foreign court. In the United Kingdom judgments for debts, damages, or costs given in one component part are enforceable in the jurisdiction of the others on application to the courts there; and in companies, lunacy, probate, and bankruptcy matters the English, Scotch, and Irish courts are auxiliary to each

other, as are the courts of the Australian Colonies *inter se*. New Zealand has already gone so far as to allow the judgments of British Courts to be executed in its jurisdiction; and the more aspiring Mauritius statute may well suggest similar legislation by the Imperial Parliament.

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### Recent Cases.

The following recent cases raise questions of international law. In *De Nicols v. Curtier*, the succession to freeholds and leaseholds acquired in England by a testator who had previously married a wife in France, under a *communauté de biens*, and then changed his domicile to England, was held to be governed by French law, by which *immeubles*, wherever situate, became the joint property of the husband and wife, on the same ground as that held to be valid by the House of Lords with regard to the personalty of the same testator (ante p. 235), viz., that the provisions of the French law which governed the property of the husband and wife at the time of the marriage were equivalent to a special contract between the parties to that effect. It is, however, to be remembered that English and American jurists have always held that immoveable property was governed by the *lex situs* and not by the *lex domicilii*. It is not at all clear that the House of Lords by its decision in the case of personalty in such circumstances meant to extend a similar rule to the case of immoveables; and it would certainly seem that more evidence is required in the latter case than in the former that such was the intention of the parties. No doubt in time this point will be determined by the ultimate court of appeal.

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In *Hunt v. Northcote* the same point was raised as in *Simonin v. Mallac*, and was decided in the same way. A marriage celebrated between a Frenchman and English-

woman, before a British Consul at Bordeaux, which was pronounced void by a competent French Court for want of formality, is nevertheless good in England, being good by the *lex loci contractus* (the presence of a British Consul by statute giving the same effect as if the marriage had been performed in British territory), and the (French) law of the domicile not imposing any incapacity on the parties.

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In *Viditz v. O'Hagan*, an Irish lady under age married in Switzerland a domiciled Austrian, after executing marriage articles in English form by which (*inter alia*) she covenanted to settle after acquired property; after coming of age she executed a settlement in accordance with the articles, but without the formalities required by French or Austrian law; and on further property accruing to her, she and her husband executed in Austrian form a notarial act purporting to revoke the articles and the settlement, as they could do by Austrian law notwithstanding the birth of issue. Mr. Justice Cozens Hardy was of opinion that the articles and settlement were governed by English law and were not affected by formalities required by the *lex loci matrimonii* or *domicilii* of the husband; but this was reversed by the Court of Appeal, holding that Austrian law applied and the revocation was good.

The Court of Appeal has also reversed the judgment of the Probate Court in *Loustalan v. Loustalan*, and held that the will of a Frenchwoman executed while resident in England, who afterwards married a Frenchman who was residing in England at the time of the marriage on account of a sentence of imprisonment passed on him by a French Court, but who returned to France at the expiry of the term of sentence, while she resided in England till her death, was governed by English law, and was therefore revoked by her marriage.

The cases of *Driefontein Co.'s Mines v. Jansen*, and *West Rand Central Gold Mines Co. v. Rougemont* in the Commercial Court, where the owners of gold commandeered by the Transvaal Government in its export sought to recover under insurances upon it "against all risks or theft, or arrest by agents of the S.A.R.," are only of interest in this connection as being decided in the plaintiffs' favour on the ground that no state of war existed at the time of seizure, and an existing intention to wage war was not an act of war.

In *Thierry v. Chalmers* the Court of Chancery has recognised the right of the *tuteur* of a domiciled Frenchman, judicially declared lunatic in France, to have the lunatic's property in England transferred to him, in accordance with the general principles of private international law.

#### X.—NOTES ON RECENT CASES (ENGLISH).

In the case *Reg. v. Baines* (100 L.T. 130), Baines, a married woman, was found guilty and sentenced on an indictment charging her, together with her husband and others, with receiving property, knowing the same to have been stolen. Her counsel submitted, on the authority of *Reg. v. Archer and others* (1 Moody C.C. 143), that the conviction was bad, inasmuch as the charge, being a joint one, the question of a separate receiving by her had not been left to the jury, and it was submitted that it was too late after sentence to cure the verdict by asking the jury whether the prisoner was guilty of a separate receiving. The Deputy-Chairman of Liverpool County Quarter Sessions, however, over-ruled the objection, and asked the jury whether the prisoner was guilty of a separate receiving or not. The above question being reserved for the consideration of the Court for Crown Cases Reserved, the Court

(Lord Russell, C. J., Lawrence, J., Wright, J., Channell, J. and Bucknill, J.) held that the case as stated disclosed ample evidence of a separate receiving by her, and that she was not then acting under the influence of her husband. It is clear that the Deputy-Chairman should have told the jury that the mere fact of a marital relation did not raise any presumption of the husband's control. In deciding *Brown v. Attorney General for New Zealand* ([1898] A.C. 234) the Privy Council pointed out that the mere presence of the husband at the time of the commission of an offence, without more, does not furnish a presumption of marital control. But any difficulty as to whether the respective acts of the husband and of the wife may be regarded as separate crimes is removed by section 94 of 24 and 25 Vict., c. 96, which enacts that if upon the trial of two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict upon such indictment such of the said persons as shall be proved to have received any part or parts of such property. But the Court wisely refrained from arriving at a conclusion on the second point submitted to it, the Lord Chief Justice saying, "it is not necessary to consider it for the purposes of the present case; I should hesitate for a long time before I could arrive at the conclusion that the course taken was a proper one." We may add that the decision on the first point is quite consistent with *Reg. v. Cohen* (11 Cox 99), and with the collateral point in *Reg. v. John* (13 Cox 100).

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The Court of Crown Cases Reserved has also dealt with an important question of evidence in *Reg. v. Ollis* (109 L.T. 225). The prisoner was charged at the Bath Quarter Sessions in respect of several transactions, one of which was the subject of the first indictment, and the other two were the subject of the second indictment. The prisoner was

acquitted on the first indictment. On the trial of the second indictment, the counsel for the prosecution called the prosecutor in the first case to prove the transactions of the prisoner with him, as being relevant to the charges then before the Court and as negating any reasonable belief on the part of the prisoner that there was money at the Birkbeck Bank to meet these or other cheques, the prisoner having in all the cases obtained money from divers persons by cheques drawn on the above Bank, where he had had no active account for many years. He was, moreover, an undischarged bankrupt. The Recorder objected to the evidence of the prosecutor in the former case being adduced, but ultimately, on being pressed, consented to it being given. He, however, on the prisoner being convicted, reserved the point for the consideration of the Court for Crown Cases Reserved. This Court (Lord Russell, C. J., Mathew, J., Grantham, J., Wright, J., Darling, J., and Channell, J.) decided—Bruce, J., and Ridley, J., in part dissenting—that the evidence adduced by the prosecution was quite admissible, and that the prisoner was properly convicted. The Court relied on *Reg. v. Francis* L.R. 2 C.C. 128; *Reg. v. Rhodes* [1899] 12 B. 77; *Reg. v. Westwood*, 4 C. & P. 547; and *Reg. v. Birchenough*, 1 Moody C.C. 477; these two last being found through the industry of Grantham, J. It is clear that the real test is, was the first charge the same as that on which the prisoner was being charged again, or was the evidence necessary to support the second indictment sufficient to prove a legal conviction on the first? If not, the evidence on the first indictment could be used again, because it was being used in a different case and on a different charge.

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The question of trespass on a highway was carried to the Court of Appeal in *Hickman v. Maisey* (108 L.T. 515).

It arose through the plaintiff possessing a piece of land through which a public highway ran. The plaintiff had let land on each side of the highway to a trainer of race-horses for the purpose of exercising and training them. The defendants, owners of a newspaper, made a practice of recording the doings of the horses, and often continued for an hour and a half walking up and down the highroad in front of them. On the plaintiff seeking an injunction restraining any repetition of such acts, the defendants justified their action as being a legitimate user of the highway. The plaintiff succeeded both in the Court of Appeal (Smith, L. J., Collins, L. J., and Romer, L. J.) and in the Court below. The contention of the defendants was that the entry on the highway being lawful in itself, it was not rendered unlawful because it was used for the purpose of business, instancing the case of a hawker or carrier. The true rule of law, we submit is laid down in *Reg. v. Pratt* (25 L.T.R. 65, and 4 E. & B. 860); the land in question in that case was a highway, and the prosecutor was the owner of the soil. The prisoner was charged with trespassing on land in pursuit of game. He did not go on the highway for the purpose of using it as a highway, but solely for the purpose of searching for game. Lord Chief Justice Campbell says, in that case, that Pratt "was beyond all controversy on the land, the soil and the freehold of which was in the owner of the adjoining land. It is true the public had a right of way there, but subject to that right the soil and every right incident to the ownership of the soil was in the prosecutor." Pratt, being on that land, was undoubtedly a trespasser if he went there not in exercise of the right of way, but for the purpose of seeking game. The legitimate use of a highway is generally described as a "right of passage," or a right of passing and repassing. In 1 Rolle's Abridgment, (392 B. pt. 1, 2) referred to and adopted by Lord Mansfield in *Goodtitle v. Alker* (1 Burr 133, at p.

143), it is stated "the King has nothing but the passage for himself and his people, but the freehold and all profits belong to the owner of the soil." It is clear that trespass will lie for any interference with the owner's rights in the soil of a highway, and he may maintain ejectment for an exclusion, as by a building upon the soil of the highway.

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In *Nickoll and Knight v. Ashton, Edridge and Co.* (109 L.T. 60), the plaintiffs claimed damages for breach of contract by the defendants. The defendants had sold the plaintiffs a cargo of Egyptian cotton-seed to be shipped on the steamship *Orlando*, during last January. In the preceding November, but after the contract, the ship had been stranded, and could not be made ready in sufficient time to receive the cargo. The plaintiffs claimed damages for the difference between the contract price and the market price on January 31st. The defendants alleged that as the performance of the contract had become impossible, they had not committed a breach of it, and were therefore not liable. It was held by Mathew, J., sitting in the Commercial Court, that the contract, having become impossible of performance, was at an end, that a condition to that effect ought to be implied in the contract, and that the defendants must succeed in the action. This judgment seems to be consistent with what was laid down by Blackburn, J., in *Taylor v. Caldwell* (8 L.T.R. 358, and 2 B. & S. 839), viz.:—"The principle seems to us to be that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance." The same principle was applied in *Appleby v. Myers* (L.R. 2 C.P. 651). There the plaintiffs undertook to erect certain machinery upon the defendant's premises, and keep it in



repair for two years. While the work was in progress the premises were wholly destroyed by fire. The fire was held to discharge the contract. The same spirit appears in the Sale of Goods Act (36 & 37 Vict. c. 71), section 7 of which enacts that an agreement to sell specific goods is avoided if, before the risk has passed to the buyer, by fault of neither party the goods perish.

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We referred, at page 355 of this volume, to the case of *Powell v. Powell* (44 S.J. 134) where Farwell J. set aside a settlement executed by a young lady just of age in favour of step-relations. The Court of Appeal in *Barrow v. Willis* (109 L.T. 58) have just reversed a contrary decision of Cozens—Hardy J., and decreed a declaration in favour of the plaintiff's claim. There, as in *Powell v. Powell*, the principle of *Huguenin v. Baseley* was invoked, but Cozens—Hardy J., had (81 L.T.R., 321), decided against the lady. The plaintiff had in 1889 married one Willis, and in the following year a deed was executed for the purpose of carrying out a family arrangement between Willis and his mother and settling property belonging to them. The plaintiff was a party to the deed. This was followed by two other deeds, to which the plaintiff was also a party, and which dealt with the same property. The son of the solicitor who prepared the three deeds had a contingent interest in the property. In 1897 the plaintiff, being a widow, was re-married, and shortly afterwards commenced an action claiming rectification of the settlement by restoring the general power of appointment to her as the survivor. It was contended on her behalf that the solicitor in question was her solicitor and confidential adviser at the times when the deeds were executed, and that in neglect of his duty he did not explain to her that she was voluntarily releasing a portion of her life interest and the general power of appointment, and that this release could not be supported because the son of

the solicitor benefited by the release of the general power of appointment, and his reversionary interest was thereby rendered less liable to failure. The Court of Appeal, relying on *Liles v Terry* (73 L.T.R. 428), reversed the decision of the Court below, considering that the learned Judge had not attached sufficient importance to the confidential relationship that existed between the solicitor and the plaintiff, and that he had over-rated her admission that she did not employ him as her solicitor. A gift to a solicitor—and there is small difference when his son is in question—made by a client, who has had no independent advice, while there is any influence over the client arising from the solicitor acting as such, is invalid. If a client wishes to make a gift to his solicitor, what the solicitor must do in order to make the gift a valid one is to obtain competent and independent advice for the donor. Some judgments of Lord Eldon are very strong authorities in support of this rule; and there is also a very valuable judgment of Turner, L. J., in *Rhodes v. Bate* (13, L.T.R., 778). In *Liles v. Terry*, Lopes, L. J., says: "I do not recognise any substantial distinction between a gift to a solicitor and a gift to a solicitor's wife, even though she may be a relative of the donor." And in *Goddard v. Carlisle and others* (9 Price, 169) Richards, C. B., says: "There is no difference in principle between a gift of this sort to a man's wife, and a gift immediately to himself, if the gift to the wife be effected by undue means on the part of the husband." From these eminent authorities we may gather that the principle and basis of the rule is that while confidential relations exist between a solicitor and a client it is impossible to rebut any inference of undue influence in the making of a gift.

SHERSTON BAKER.

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*The Law of Animals.* By JOHN H. INGHAM. Philadelphia: T. & W. Johnson & Co. 1900.

THE law of "Property in Animals, wild and domestic, and the rights and responsibilities arising therefrom" has hitherto had to be collected from a great variety of sources, and it has been left to Mr. Ingham, a learned member of the Philadelphia Bar, to produce a work dealing comprehensively with the subject. "The Law of the United States," which naturally forms the greater part of the work, is in many points the same as our own. From the nature of the country the question of property in wild animals is more often raised in the States, and is, perhaps, of more importance than in our own land, and it is interesting to notice the decisions as to the property in bees and honey, which are not often the subject of litigation over here. On the other hand, from the different manner in which railways are constructed in America, there is a much greater mass of decisions and questions of law as to the liabilities of railway companies for injuries to animals, both irrespective of, and under the numerous statutes which have been passed relating to fences. It is, however, interesting to see that the much attacked doctrine of *scienter* is still in force. We do not quite approve of Mr. Ingham's practice of using citations from legal periodicals to state or summarise the law on a point. Such citations, however learned may be the writer, and however respectable the periodical, are not authorities, not even if they should come from our own pages.

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*Railway and Canal Traffic Cases.* Vol. X. By J. H. BALFOUR BROWNE, Q.C., WALTER H. MACNAMARA, and RALPH NEVILLE, LL.B. London: Sweet and Maxwell, Limited. 1900.

THE tenth volume of reports of the cases decided by the Railway and Canal Commissioners, edited as it is by gentlemen so thoroughly familiar with this subject, must be of the greatest value to all interested in the important and difficult questions of through rates, facilities for traffic, and last but not least, in a sub-

ject which is likely in the future to trouble Railway Companies in an increased degree, "Workmen's Trains." The value of the volume is much increased by the excellence of its paper and type.

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*The German Commercial Code.* Translated by BERNARD A. PLATT, London : Chapman & Hall, Ltd., 1900.

THE Commercial Code of our great commercial rival is well worth study by both commercial men and lawyers, and Mr. Platt has done good service in preparing his careful translation. The spirit of the code strikes us as very significant, and the regulations as to the entries in the *Trade Register*, and the manner in which traders must keep their books (though this is mostly taken from the French *Code de Commerce*) evidence a state regulation of private business which would be very unwelcome here. The greater part of the code deals with trading companies and partnerships and maritime commerce, and a good many branches of what is generally understood as commercial law are not included, notably the law of Bills of Exchange, Fire Insurance and Patents. Bankruptcy, even, is only dealt with as far as it affects companies and partnerships. The book does not bear the usual outward aspect of a law book, the cover being adorned with the German national colours.

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*A Concise Introduction to Conveyancing.* By J. ANDREW STRAHAN, M.A., LL.B. With a chapter on Registration of Title, by WILLIAM BLYTH, B.A. London : Butterworth and Co. 1900.

MR. STRAHAN has produced this work "not so much to teach the student to draft, as to enable him to understand assurances of land." This is, of course, an indispensable preliminary to the other, and is, besides, a necessary part of the education of every lawyer. The plan adopted, which is a good one, and admirably carried out, is first to give a general history of the introduction and features of the various modes of assurances of land. Then Assurances by way of Purchase, Assurances by way of Settlement, Assurances by way of Mortgage, and Assurances by Will are taken separately. Usually a form of each class is given, and then the clauses are one by one considered and explained. The work concludes with a short *résumé* of the provisions of the Land Registration Acts.

*The Law of Bailments.* By EDWARD BEAL, B.A., with notes to Canadian Cases, by A. C. FORSTER BOULTON. London: Butterworth & Co. 1900.

It really is remarkable that no new book has been published on the Law of Bailments since the well-known treatise of Sir William Jones, the last edition of which came out as long ago as 1833, and the learned author has done well in projecting and completing his really important work. He has naturally and wisely followed Story's great work, but we do not think he has been so much tempted, as the authors of some recent works, to make an excessive use of American authors. The result of Mr. Beal's labours is a handsome and well-printed volume, well arranged, and treating exhaustively all the branches of the subject. One marked feature of the work is the very large number of quotations given from judgments to support or illustrate a definition. This has both advantages and disadvantages. While it gives more weight to a definition than if it were merely the opinion of the author, the quotation is often so apt to be limited by the special circumstances of the case in which it was delivered, that it does not give so broad and general a view of the law as we require. As an instance, under the heading "Degrees of Care and Neglect," a number of judicial definitions of "negligence" and "gross negligence" are given, which, though useful as authorities for any particular proposition, do not, we think, tend to clear up the doubts that exist on the subject, but leave the reader in rather a confused state of mind as to what the legal difference may be, if indeed there is any.

After an introductory chapter on Bailments generally, come "Gratuitous Bailments," which are divided into "Deposits," "Mandates," "Loans for Use," then "Bailments for Reward," and last of all, and occupying nearly half the book, "Carriers." The whole is well and thoroughly carried out, and the Canadian Notes, which are not incorporated in the text, but are found in the form of foot notes, are frequently important and always interesting.

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*Appeal Cases under the Food and Drugs Acts 1875 and 1879, and Margarine Act, 1887.* By B. SCOTT ELDER. London: Butterworth and Co. 1900.

THIS is a collection of the Appeal Cases under the Food and Drugs Acts, etc., arranged and indexed by Mr. Scott Elder, who

is a Chief Inspector of Food and Drugs and Weights and Measures for the County of Durham. He does not attempt to interpret any of the decisions, or indeed express any opinion about them, beyond remarking that they "are very often, apparently, contradictory to one another, and in direct conflict with the ordinary reading of the statutes"!

*The Yearly Digest of Reported Cases, 1890.* Edited by G. EDWARD BEAL, B.A. London: Butterworth and Co. 1900.

THIS is not only a digest of the reported cases in the English Supreme and other Courts but also of a numerous selection of decisions in Irish and Scotch Courts. The arrangement is good, there are numerous and useful cross-references, and the digests of the cases are clear and accurate. There is a very complete list of cases affirmed, revised, etc., and lists of the Statutes, Orders, Rules, etc., referred to.

*Law relating to Gas, Water, and Electric Lighting.*

*The Law Affecting Trustees in Bankruptcy.* By LAWRENCE DUCKWORTH.

*The Insurance Agents Handbook.* By J. G. R. STEPHENS.

*Law of Wills for Testators.* By G. F. EMERY, LL.M. London: Effingham Wilson. 1900.

THESE little books are all carefully and well done, and likely to be useful to various sections of the public. Two of the series are intended for two different classes of business men, though there is much in them useful to others. One is for that large and unfortunate section of the public, who groan under the rule of the Gas and Water Companies, and the other is for the benefit of those foolish individuals who will make their own wills. We must do Mr. Emery the justice to say that though he gives them every assistance in their rash undertakings, he advises them most strongly not to attempt it.

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*Unwritten Laws and Ideals of Active Careers.* Edited by E. H. PITCAIRN. London: Smith, Elder and Co. 1899.

THIS is a very interesting series of essays, by men of "light and leading," on the subject of the codes of practice and ideals

in their respective callings. They vary, as might be expected, very much in consistency, some being mere rules of practice and others dealing more or less fully with ideals.

Of the ones that concern us most, the essay on "The Judges," by Sir Herbert Stephen, is rather disappointing, as it deals too much with the constitution of their courts and the routine of their official duties. Mr. Birrell, in his discourse on "Barristers," dwells on at least two points on which we thoroughly agree with him. He expresses, we think most satisfactorily, the absurdity of the casuistical question which has been so much argued of "*Ought an advocate to undertake the conduct of any cause he knows to be unjust?*" He also calls attention to "the slackening of discipline and the wearing out of tradition at the Bar," which he rightly attributes to, amongst other causes, the decay of the old circuit system and the discipline of the mess. There are many other excellent contributions, among which we should specially like to call attention to the one on "The Medical Profession," by Mr. Brudenell Carter, and to perhaps the best of all, but one not suitable for consideration in our pages, namely, that on "The Clergy," by the Rev. W. B. Trevelyan. We do not quite see the suitability of the inclusion in the series of the essay on "Boys at Public Schools." The whole of the essays of this series are full of information and interest.

### NEW EDITIONS.

Second Edition. *The Law Relating to Electric Lighting and Energy.* By JOHN SHIRESS WILL., Q.C.  
London: Butterworth & Co. 1900.

THIS new edition was necessitated by the passing of the Electric Lighting (Clauses) Act, 1899, which has embodied in one Act the clauses usually inserted in Provisional Orders, and the new Rules issued by the Board of Trade, in consequence of the passing of such Act. The book consists of a valuable introduction dealing with the legal aspects of Electric Lighting, with three very interesting and useful appendices, containing respectively (1) The questions put to and answers made by Lord Cross's Committee; (2) The evidence of Sir Courtenay Boyle, K.C.B., before a Committee of the House of Commons in 1898; (3) A collection of the points in which a County of London provisional order differs from other provisional orders. Then comes the Electric Lighting

Acts from 1889—1897, with the regulations made under them by the Board of Trade, and the clauses of other Acts incorporated with them, all fully annotated, and a form of Provisional Order. We wish specially to call attention to the excellent index, and the manner in which the book is turned out does credit to the publishers, as the accuracy and learning does to the author.

Second Edition. *Contracts in Restraint of Trade.* By W. ARNOLD JOLLY, M.A. London: Butterworth and Co. 1900.

MR. JOLLY has rewritten and enlarged this work, and turned it into an excellent book of reference for the profession. He traces with great care and clearness the growth of the principles on which Contracts in Restraint of Trade have been decided, and shows how they have changed with the changes and developments of modern society, and industrial life. The law on many points is not yet quite clear, but Mr. Jolly does much to point out how doubtful points are now likely to be decided, and has no hesitation in saying when he thinks a decision would not be now followed. We notice that he is particularly severe in this respect on that great Judge, the late Lord Justice James. We must call particular attention to the chapter on "Construction of Contracts in Restraint of Trade," and to the very useful Appendix A, which contains a schedule of the principal trades and professions which have been the subject of decisions on this point.

Third Edition. *Carriage of Goods by Sea.* By THOMAS GILBERT CARVER, M.A., Q.C. London: Stevens and Sons. 1900.

THE new edition of Mr. Carver's well-known work is somewhat larger than the last one, containing about one hundred pages more, and a large number of new cases are dealt with or referred to. The most important additions that we have observed are those dealing with the important American Act of 1893, known as the Harter Act, which was passed "with two main purposes; First that of *prohibiting* clauses which relieve shipowners from liability for consequences of 'negligence, fault or failure in proper loading, storage, custody, care, or proper delivery' of cargo."—"Secondly, that of *exempting shipowners* from liability for consequences of faults or errors in navigation or in the management of the vessel, as well as of certain other perils, in cases where they



have exercised due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied." The importance of the effect of this Act on British Trade with America is indicated by the fact, that the United States Courts, "apply these provisions without any express incorporation, not only when the carrying ship is American, but also when it is of British or other nationality." A number of cases from the Federal Courts of the United States which have been decided upon the construction of this Act are cited to explain and illustrate it. Mr. Carver criticises the decision of the Court of Appeal in the important case of *Cahn v. Pockett's &c. & Co.*, and it must be admitted that there is considerable force in his submissions. It is interesting to notice that in spite of Mr. Carver's criticisms of the decision of the late Lord Hannen in the case of *The Carron Park* in his last edition, yet that decision has been approved of by Barnes J., and followed by Mathew J. There is an interesting note pointing out the law of several Foreign Countries on this point. If there is anything which might have been more fully dealt with in this work it is, we think, the very important question of what is "contraband of war," and the other questions connected with it, the references to which seem rather inadequate to the importance of the subject, and on which Mr. Carver's opinion would have been of very great value. In appendix D, there is an interesting article bearing on the changes introduced by the York-Antwerp Rules, reprinted from the "Law Quarterly Review."

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Fourth Edition. *Kelly's Draftsman.* BY LEONARD H. WEST, LL.D., AND WILLIAM AUSTIN. London: Butterworth and Co. 1900.

THE early appearance of another edition of this useful work proves that it is thoroughly appreciated by practitioners, and we are not surprised, as both the notes and forms are, though concise, very careful and judicious, and it is especially well provided with notices, statutory declarations, and other forms which are constantly required in practice, but which are not easily found in much more voluminous works. The present edition also contains a collection of the official and other forms necessary for the registration of title of, and other dealings with land in registration districts. We think it would have been an improvement to have had a few more forms connected with arbitrations.

Fourth Edition. *Principles of the Law of Compensation.*

By C. A. CRIPPS, M.A., B.C.L., Q.C. London: Stevens & Sons. 1900.

THE law of compensation is one of increasing importance. There has of late been a constant creation of new public bodies, with compulsory powers of taking the land of private individuals for the supposed public benefit; but very similar questions have sometimes to be decided between two public bodies, one of whose interests is injuriously affected by an alteration of boundaries or areas for the benefit of the other. Mr. Cripps's work is well known, and has gone through several editions, but, since the last, two important Acts—the Local Government Act, 1894, and the Light Railways' Act, 1896—have been passed, in which new principles of compensation have been laid down, and the necessity for another edition became obvious. This has been carried out with great care and industry, and the book remains an invaluable guide on the subject it deals with. We could wish the important and interesting subject of Betterment had been more fully dealt with, as it is very cognate to "Compensation," and has, in fact, already found its way into the public, and some private lots. There is a good collection of precedents, and the appendix contains the statutes to which the author has found it necessary to refer, an addition which will undoubtedly accomplish his desire of making the book "of greater assistance to the practitioner."

Sixth Edition. *Shirley's Leading Cases in the Common Law.*

By RICHARD WATSON, LL.B. London: Stevens and Sons. 1900.

THE example set by the late Mr. J. W. Smith, in his well-known collection of "Leading Cases," has been followed in many similar collections intended to contain the important principles of the *Case Law* of other branches of Law; and the present is a very well-known follower of his great work. It was originally intended for the use of students in the ordinary sense of the term, and much of it was couched in rather striking language, with the laudable object of fixing the attention of the class for whom it was meant. This characteristic has been considerably modified, and the work has now more ambitious aims. It contains about 150 leading cases, about one-third of which are the same as in *Smith's Leading Cases*. The statements of Leading Cases and the notes are alike short and clear, and the notes contain all the most recent cases related to the Leading Cases. Most of them

seem to be accurately stated, but we observe that the note on *Appleby v. Franklin* is inaccurate and therefore misleading.

Seventh Edition. *The Law of Torts*. By ARTHUR UNDERHILL, M.A., LL.D., Assisted by HERBERT STUART MOORE. London : Butterworth & Co. 1900.

MR. UNDERHILL has now brought out the seventh edition of his excellent little work, and deserves all the success he has achieved. He has condensed the main principles of "The Law of Torts" into something under 150 articles, and elucidated them with notes, always clear, and as far as we have tested them, accurate, and containing the latest authorities on the point in question.

Eighth Edition. *Russell on Arbitration and Award*. By EDWARD POLLOCK and the late HERBERT RUSSELL, B.A. 1900. London : Stevens and Sons, Limited. 1900.

THERE is, so far as we know, no return which gives anything like exact information as to the number of disputes which are decided by arbitration, yet, in spite of there not being so strong a tendency on the part of the Bench, as there was once, to force references, the number must be very large of those referred formally and informally; and even in the most informal references questions may arise which have ultimately to be decided by a Court of Law. It is, therefore, of great importance that a really good book on the subject should be accessible, and this position *Russell on Arbitration* has long filled. It is the book on the subject, and we must join in the regret felt by his many friends, that, owing to the lamented death of Mr. Herbert Russell the name of Russell will not be actively associated with any future editions. No better editor could have been selected than Mr. Edward Pollock, thoroughly qualified to deal with the subject from his experience, both at the Bar, and as an official Referee, and he has accomplished the unusual and satisfactory feat of bringing out a thoroughly complete new edition without increasing the bulk of the work, nor, so far as we can see, sacrificing any useful matter.

The labours of the editor of this work are much increased by the great tendency at present to provide in statutes creating new rights or liabilities for the determination of disputes by arbitration. A notable example of this is the Workmen's Compensation Act, 1897, and numerous other recent instances could be quoted,

all of which will be here found, treated in a careful but concise manner. The only omission we have noticed is that the Electric Lighting (Clauses) Act, 1899, seems to have been overlooked, and as there are a good many cases which would, under that Act, have to be settled by arbitration, it is somewhat important. There are also some cases under the Prisons' Acts, in which disputes have to be settled by arbitration, as well as the differences between the Secretary of State and prison authorities referred to in this work. There is a very useful appendix of forms, and also an appendix of statutes, and rules made under statutes relating to arbitration.

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*Action at Law.* Second Edition. By JOSEPH L. SHEARWOOD, London: Geo. Barber, 1900.—This little book quite justifies its sub-title, "A concise analysis of the practice of the Courts." It is well arranged, and carefully, and accurately carried out.

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*A Practical Guide for Sanitary Inspectors.* By FRANK CHARLES STOCKMAN. London: Butterworth and Co. 1900.—Though intended for the use of Sanitary Inspectors, to whom it points out their duties practically and legally, it contains a great deal of information which should be useful to all householders and heads of families.

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*Commercial Law.* By W. DOUGLAS EDWARDS, LL.B., London: Methuen & Co. 1900.—This little book which is one of Methuen's Commercial Series "is designed for use in commercial education" and treating as it does of the general principles of contracts, and, with more detail, of commercial contracts and commercial property, is calculated to give much useful information to business men. It is accurate as far as its space permits, but it would have been better in dealing with appeals from County Courts to point out that an appeal can only be brought on a question of law not of fact.

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*The Rights of Local Authorities as Regards Private Bills.* By C. E. ALLAN, M.A., LL.B. London: Shaw and Sons, 1900.—As the author points out in the introduction to this useful little book, local authorities have frequently to consider the advisability of promoting or opposing a bill in Parliament, and the first question that invariably arises when the subject is under discussion is as to whether the authority have the power necessary to enable them to do so, and if that question is answered in the affirmative, the second question is as to whether they can defray the expenses of

so doing out of the rates. The costs and charges of all Parliamentary proceedings are so heavy that it is of the greatest importance that a correct answer should be given to these questions in each particular case, and the object of the author has been to bring together in a concise form the various cases that have been decided upon the subject, and briefly to state the law as it has been there laid down. He has succeeded admirably in his self-allotted task, notwithstanding that the chapters are substantially a reprint of a series of articles which appeared in the *Justice of the Peace* last year. The book is needed, and will be found most useful to local authorities and even practitioners at the Parliamentary Bar, as the subject is of considerable practical importance and it is not usually discussed in the text books. The contents have been admirably arranged with side-heads and full references, and the principal statutory provisions mentioned in the text have been added as an appendix.

*Outlines of Equity.* By SYDNEY E. WILLIAMS. London: Stevens & Sons. 1900.—This is a very well-arranged and clearly expressed work. Great labour seems to have been taken with it, and a very judicious selection of authorities has been made. It covers a great many of the important Principles of Equity, and the accuracy it combines with conciseness is remarkable.

*Rouse's Practical Man.* By ERNEST E. H. BIRCH, B.A. London: Sweet and Maxwell. 1900.—In preparing this, the seventeenth edition, for the press, Mr. Birch no doubt has had a difficult task, seeing that fifteen years have elapsed since the previous edition. He has, however, acquitted himself most creditably, and the *Practical Man* will be found equally useful by lawyers and laymen. The first part of the book, which deals mainly with legal questions, has been re-arranged and amplified, and contains a mass of useful information collected under the head of Death Duties. Short abstracts are also given of the principal statutes passed since 1884. The second part contains matter of more general information, including a number of new calculations and tables. There is a very full index, and for many little points of practical utility which the practising lawyer does not usually carry at his finger-ends, but often wants, when least expected, the *Practical Man*, which has been produced in note-book form, will be found invaluable.

*A Guide to Criminal Law.* By CHARLES THWAITES. Fifth edition. London: Geo. Barber, 1900.—This is one of the numerous and useful handbooks provided for the law students by Mr. Thwaites and his colleague, Mr. Indermaur, the well-known legal coaches. That the work has run through four editions proves its popularity, and although primarily intended for the use of students, whether for the Bar or articled clerks, we doubt not that some of the very junior members of the Bar would derive considerable benefit if they made themselves acquainted with its contents and would be less likely to get into difficulties at sessions or the assizes when entrusted with the prosecution or defence in criminal cases. In addition to hints to the student as to what to read, the elements of criminal law are given pretty fully, and the student is enabled to test his knowledge of the subject by a copious set of questions and answers. The author has evidently spared no efforts to thoroughly revise the book and bring it up to date, and make it serviceable for the duty it professes to undertake.

#### CONTEMPORARY FOREIGN LITERATURE.

*La Vie Judiciaire à New York.* By ÉMILE STOCQUART, Avocat à la Cour d'Appel de Bruxelles. Brussels: 1900.

THIS is a reprint of an interesting paper read at a conference of the *Jeune Barreau* of Brussels, on the 15th December, 1899, by the well-known authority in the field of comparative legislation. He gives a succinct account of the administration of justice in the State of New York, paying a high tribute to the efficiency of the New York Bar Association.

#### PERIODICALS.

*Criminalogia Moderna.* February, 1900. Buenos Aires.

THIS number is distinctly interesting. Señor G. Sittoni raises the question whether genius imports a predisposition to crime. "Yes," says the learned writer, and supports his hypothesis by the examples of Machiavelli, Benvenuto Cellini, Richelieu, Cromwell, Leopardi, Ibsen, Tolstoi, and others. Professor Alderman of Melbourne supports the dictum of Taine that for every school that is opened a gaol is closed.

*Journal du Droit International Privé.* 1900. Nos. I. to IV.  
Paris.

AN article by Dr. H. Fromageot on provisions considered as contraband of war reviews the difficulties of which the seizure of cargoes of American flour consigned to Lorengo Marques afford a good example. The case of *Gresse v. Nouvelle Compagnie Bordelaise de Navigation* (Cour d'Appel of Bordeaux, 14th June, 1899), decided that in an English charterparty the word "barratry" was to be read in the English sense, not in the more extensive sense borne by the French *baraterie*. In the case of *Murphy v. Lee Jortin* (Tribunal Civil of Dieppe, 22nd January, 1900), the Court declined jurisdiction in an action brought by an Englishman against the British Vice-Consul at Dieppe for defamatory words spoken in the defendant's official capacity. A curious decision is one given by the Tribunal Civil of Tunis that a notarial act by a Tunis notary is only good in the Regency, and that such an act is null and void if done during a pilgrimage to Mecca. Some of the English cases reported are rather belated, one having been decided as far back as 1896.

*Kosmodike.* April—June, 1900. Berlin.

PROFESSOR ALBERT WAHL, of Lille, begins a learned and interesting article on the rule *mobilia sequuntur personam* as it applies on death in English law. It is rendered less complete by the author's ignorance of some recent statutes and by certain misprints, e.g., "english," "Gualter," "Lord Hougham," (presumably Brougham). A new feature of *Kosmodike* is the appearance of occasional feuilletons dealing with the history or romance of law. That on the trial of the Bishop of Troyes in 1308 will be found very interesting as an example of procedure under Philippe le Bel.

*Rivista di Diritto Internazionale e di Legislazione Comparata.* January-March, 1900. Naples.

Two reported cases of interest will attract the English student. On 27th February, 1900, the tribunal of Milan held that as Russia was not a party to the Berne Copyright Convention, the publication of an unauthorised translation of Sienkiewicz's *Quo Vadis* as a feuilleton in the *Corriere di Napoli* was not a wrong for which the owner of the copyright had any remedy. On 26th February and 16th March respectively the tribunal of Naples held that contracts, to pay differences on the London

Stock Exchange and the Paris Bourse were valid and enforceable. The case of *Universal Stock Exchange v. Strahan* [1896] A.C. 173, will suggest itself to English readers. There is a decision of a curious and interesting tribunal, the *Consiglio de' XII* of San Marino, which, it is remarkable to notice, falls under the head of *Giurisprudenza Straniera*. Sometimes curious errors in English names and offices are made. For instance, it takes some time to identify the learned Recorder of Wigan under the disguise of "Joseph Halton, Q.B."

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*Deutsche Juristen-Zeitung.* 15th April—1st June, 1900. Berlin.

THERE is a good deal of discussion of the so-called "lex Heinze," the new German law for securing public decency, something on the lines of our Lord Campbell's Act and Theatres Act rolled into one. The terms of the enactment are so wide that difficulties of interpretation must inevitably arise. Various jurists contribute to a symposium on a question which one can hardly regard as arising in England, viz., whether the teaching of elementary law be possible in Realgymnasia. Opinions, as might be expected, differ very much.

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*Rivista Politica e Letteraria.* April—June, 1900. Rome.

IN the June number Professor Manfredi Siotto-Pintor, of the University of Urbino has a long article on the scientific revival of the so-called "International Law" and the errors of the "juristic view." He advocates *instauratio ab initis fundamentis* on the ground that the analogy between the rules governing individuals and the rules governing States is a false one. The life of a race cannot be regulated by juristic rules, but this is forgotten by those who frame the rules, usually lawyers accustomed to deal with the law between man and man. The consequence is the existence of text-books, useful for students preparing for examinations, but apt to break down under the stress of events. Such is an outline of Professor Siotto-Pintor's indictment of the existing system. It is defective, no doubt, but has the merit of comprehensibility, which is somewhat to seek in the learned Professor's substitute, apparently a kind of moral suasion to act in accordance with common ethical feeling (*Zusammengehörigkeit*). But what if one nation takes a different view of this from another?



*La Giustizia Penale*, 26th March—11th June, 1900. Rome.

THE case most interesting to English lawyers is that of *Pisoni* (p. 704), where the Court of Cassation held that a foreign company—Liebig's Extract of Meat Co., Limited—could prosecute and appear as *parte civile* for the fraudulent imitation of a trade mark. There is a curious discussion on page 609 whether it be a crime, and, if so, what crime to remove the tax-label from one bicycle and attach it to another, the tax on the second being higher than that on the first. Workmen's compensation claims seem to cause almost as much trouble as in England, judging from the numerous decisions on *infortunio sul lavoro*.

*Revue Générale* and *Revue Bibliographique Belge* contain nothing of legal interest.

JAMES WILLIAMS.

Received too late for notice in this issue :—*Lawrance's Precedents of Deeds of Arrangement*; *Bastable's Theory of International Trade*; *Williams' Law of Personal Property*; *Reply of the Finnish Estates*; *The Maritime Code of the German Empire*.

Other publications received :—*The Royal Blue Book* (May Edition); *Journal of the Society of Comparative Legislation*; *Kruger and Transvaal Judiciary*; *Library Index of Law Society of Upper Canada* (Law Society, Toronto); *Studies in Private International Law* (Emile Stocquart, Brussels); *The Case of Mrs. Maybrick* (Anglo-American Magazine); *Calendar of Dalhousie Law School*; *Civil Judicial Statistics, Part II.*; *The Laws of Law*; *State Library Bulletin* (University of New York).

The *Law Magazine and Review* receives or exchanges with the following amongst other publications :—*Review of Reviews*, *Juridical Review*, *Public Opinion*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Accountants' Journal*, *North American Review*, *Canada Law Journal*, *Chicago Legal News*, *American Law Review*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Virginia Law Register*, *American Lawyer*, *Albany Law Journal*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Queensland Law Journal*, *Law Students' Journal*, *Westminster Review*, *Concord*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*.

# THE LAW MAGAZINE AND REVIEW.

NO. CCCXVIII.—NOVEMBER, 1900.

## I.—IN MEMORIAM: LORD RUSSELL OF KILLOWEN, LORD CHIEF JUSTICE OF ENGLAND.

**B**UT twenty months have passed since the death of Lord Herschell, and now we have to mourn the loss of that other great lawyer whose career, beginning, like that of the late ex-Chancellor, on the Northern Circuit some forty years ago, culminated in the Lord Chief Justiceship of England, and recently came—as did that of his distinguished rival and contemporary—to a sudden and premature close.

Lord Russell of Killowen was so many-sided a man, and threw himself with so much energy into so many kinds of work and play, that there is hardly one of his friends whose reminiscences of him could be said to cover the whole field of his life: only a syndicate could adequately perform that task. My own recollections of him date back to the time when he was still a barrister of one year's standing. He joined the Northern Circuit at Liverpool in 1859, and until he took silk he seldom went to other circuit towns, but he regularly attended the sittings of the Liverpool Court of Passage, then presided over by Mr. Edward James, the leader of the Circuit. In that court he at once jumped into business, and when its two leaders, Brett (afterwards

Viscount Esher) and J. B. Aspinall were removed—the former by taking silk in 1861, and the latter by accepting the Recordership of Liverpool a little later—Russell speedily took the lead of the Court and greatly increased his junior practice in Liverpool. He always had the highest admiration of the judicial merits of Edward James, and used to say that those who had had the advantage of practising under him during the first years of their professional life, had enjoyed an extraordinary piece of good fortune for which they ought to be ever grateful. Early in 1872 Russell and Herschell, after an unusually short probation without the Bar, took silk, and were sworn on the same day—a step which to some seemed bold at the time, but which, as we now know, in either case led on to fortune.

In the days before the Judicature Act, when all the judges left town together twice a year for circuit, and returned together on the first day of the next term, when Equity Courts tried equity cases only, and when there was no Court of Appeal—the Circuit Bar and the Circuit Mess were more important and engrossing institutions than they are now. Russell, though a fierce fighter in court, doffed his combativeness with his robes, and was a genial and clubable, and, in those days, a frequent attendant at the mess-table. There are not a few of those old associates of his who have reason at this day to be grateful to him for his exertions in forwarding their interests when they were seeking some deserved promotion in their profession.

I said that Lord Russell's career came to a premature close because, though his years verged upon three score and ten, he had always been so remarkable for strength and endurance that time seemed to have made as little impression upon his physical powers as it had upon those of his mind. He had always greatly believed in the co-ordination of physical and mental power, perhaps

because it was the condition of being in which he lived and upon which he relied, and if one were compelled to sum up his principal characteristics in a single adjective, one would describe him as essentially a strong man. And he never spared his strength. Whatever he did, he did it with all the force of his masterful will and vigorous mind and body. At the Bar he had the valuable, but by no means common, faculty of using other men's work, and he could, if need be, open a complicated case with no preparation beyond the notes and suggestions of a capable junior. But that was not his method. He took immense pains with his work and, loving victory, strove hard to secure it. He spared no time or trouble to win a verdict when there was any chance of success, but if he saw no means of escaping defeat he was not a difficult man to settle with. He was not a born orator, such as were Erskine and Cockburn, but he cultivated the art of eloquence all his life with ambition, with industry, and with success, and was always a most powerful speaker upon facts. His great and well-earned reputation as an advocate was the result of a combination of many qualities and aptitudes. He had a clear foresight of the point at which the main stress of the battle would be felt, and the faculty of bringing all his weight to bear there, without too much neglecting the other parts of the field. It is superfluous to say that he was an accomplished master of the art of cross-examination, though usually he conveyed to the onlooker the impression that it was rather by force than by subtlety that he broke down or exposed the fraudulent or uncandid witness. Those who have heard the present Lord Brampton cross-examine will remember with what friendly and, persuasive tones he would invite and seduce the witness into the path which led to a ruinous or a ridiculous catastrophe. Lord Russell's method was different, and the untruthful witness who faced him was seldom left long in doubt as to his

hostile and aggressive intentions. This power of placing a witness in an unfavourable view before a jury was indeed so great that there were occasions '*cum vix justus sit securus*'; but that is one of the hazards of all powerful cross-examination even by the most honourable and high-minded of advocates ;—a rare disadvantage, to be set against its many advantages. Another characteristic of him as an advocate was the audacity with which, in a difficult situation, he would venture upon an apparently dangerous line of cross-examination, and pursue it with unflinching courage, and often with signal success. But this was a calculated recklessness, which in less skilful hands would lead to destruction, and is not to be rashly imitated.

Lord Russell was much too clear-headed a man to forget, when he took his seat on the bench, that those who sat opposite to him would watch with keen eyes for any traces in the judge, of the methods and characteristics of the famous advocate, for signs of impatience, or of a too imperious control ; and he kept careful, and upon the whole, successful watch over himself. If at times he showed symptoms of restlessness it was certainly not because he desired to take a side, or to display from the judgment seat his old cunning in advocacy. He was quite above such vanities ; but the same strenuous nature which gave him strength to bear down opposition at the Bar, would occasionally manifest itself on the bench if he thought that time was being wasted, or an unfair or frivolous point was being pressed.

Lord Russell was, as I have said, a many-sided man. Fate, and the necessity of carving out his own fortune, made him a lawyer. Yet had he inherited an income such as the exercise of his abilities at the Bar enabled him to command, we should never have known his capabilities as an advocate or a judge, and his ambition would have been to lead a party in the House of Commons, and to win the

Derby; and so great was his force of character that possibly he would have done both. Would he have been happier? I doubt it. The pleasure of creating a great position was probably to him greater than would have been the pleasure of inheriting it; and, while rising to the head of his profession by hard work and ability, he was not altogether debarred from those two recreations in which he took delight—politics and sport. One other recreation there was dearer to him than either, though of his full and busy life it could have but too small a part—the restful days at Tadworth in the midst of a family for which he had the tenderest affection, and among those quiet rural surroundings in which, his labours ended, he might have hoped to spend some years of peaceful old age. But to work to the last, and to die in harness, was perhaps for him the more fitting end.

W. C. G.

## II.—THE DEVELOPMENT OF PATENT LAW.

THE equitable adjustment between the rights of an inventor to a beneficial interest in the results of his discovery, and the rights of the public to a reasonable participation in the general advance in the knowledge of the community consequent upon the discovery, presents a problem of no little intricacy to the Legislature.

The Aristotelian doctrine that virtue lies in the mean between two extremes is admirably illustrated. On the one hand, if too ample a protection be afforded to the inventor he becomes a monopolist, and the public suffer; on the other hand, if an insufficient degree of legal security be provided there is little inducement to the inventor to make his discovery known, and the withholding of his special knowledge is obviously detrimental to public interests.

To delimit the respective claims of the inventor and the

public is an ethical no less than a legal problem. To reconcile and harmonise the interests of the individual with the interests of the community is within the sphere of Political Economy. To safeguard the two diverging and yet convergent interests by the creation and sanction of legal rights is the province of positive Law.

That a matter of such vital importance to the commercial and industrial prosperity of the nation as the protection of inventions by the grant of Letters Patent should have received much attention from the Legislature, the Judges, and the Legal Profession, is only to be expected.

There are several well-known standard works on Patent Law, and to their number has recently been added a volume which will immediately command recognition as an authoritative and comprehensive treatise on the subject. The new work on the Law and Practice relating to Letters Patent for Inventions, by Messrs. R. W. Wallace, Q.C., and J. B. Williamson, to which reference will be found in the Review section of this issue will, without doubt, take foremost rank among treatises on this branch of the law. The practical experience in Patent cases of the first-named, and the laborious collection of authority, the careful arrangement, and lucid exposition of the law by both authors, have resulted in the production of a work which marks a distinct advance in the literature of the subject.

The early history of patents in English law is the history of monopolies. The granting of monopolies was a recognised branch of the ancient prerogative of the Crown, subject, as indeed was every prerogative right, to the common law limitation that it should be used only for the general good of the community, and not merely for the private emolument or advantage of the Sovereign. Any grant of a monopoly patent, affecting to restrict to an individual or limited number of individuals the right of manufacturing or trading in any commodity already known

and in general use, was, therefore, illegal and invalid as being opposed to common right. Upon this principle, it was held by the Court of King's Bench, in the case usually known as the *Case of Monopolies*\*, in which the legality of patents for monopolies was exhaustively argued, that a grant by letters patent to an individual of the sole right of making, importing, and trading in playing cards in England was void and illegal, as amounting to the creation of a monopoly of a known industry.

Although the legality of a patent was at common law dependent upon its being granted in respect of a new invention, and not an article previously in use, the indiscriminate and oppressive grant of monopolies in derogation of this principle by the Crown during the reigns of Elizabeth and James I., constituted one of the grievances of the period. The impeachment and severe punishment of Sir Giles Mompesson and Sir Francis Mitchell, who had earned an unenviable notoriety by the enforcement of these illegal patents, is a matter of common historical knowledge.

In 1624 was passed the well-known enactment, the Statute of Monopolies† which, after reciting the previous illegal grants of Monopolies "upon misinformations and untrue pretences of public good," declared that the granting of all monopolies and letters patent was "altogether contrary to the laws of this realm, and so are and shall be utterly void and of none effect, and in no wise to be put in use or execution." Section six of the Statute expressly excepted "any letters patent and grants of privilege for the term of 14 years or under, of the sole working or making of any manner of new manufacture within this realm to the true and first inventor and inventors of such manufactures, which others at the time of

\* *Darcy v. Allin*, 1603, Coke Rep. Pt. xi. 84 b.

† 21 Jac. I., c. 3.



making such letters patent and grants shall not use, so as also they be not contrary to the law, nor mischievous to the State, by raising prices of commodities at home, or hurt of trade or generally inconvenient." The Statute was merely declaratory of the Common Law, but fixed the extreme term of a patent grant to 14 years.

The foundation of the English Law of Patents is, therefore, the Royal Prerogative, as declared and limited by Statute\*.

The law relating to Letters Patent for inventions was amended by Statutes of 1835, 1839, 1852, 1853, 1859 and 1870†, which, though effecting various changes, still left room for improvement in the law.

The legislation on the subject culminated in the Patents, Designs and Trade Marks Act, 1883, which amended and consolidated the law, and repealed the earlier Statutes with the exception of the essential clauses of the Statute of Monopolies‡.

The Act of 1883 created the Patent Office, under the control of the Comptroller-General, who acts under the superintendence and direction of the Board of Trade, at which a Register of Patents is to be kept open to public inspection.

The Act contains detailed provisions as to the application for, and grant of, Patents; enables the provisional protection of an invention during the period between the date of application and the date of sealing the Patent, and gives full protection after the acceptance of a complete

\* Section 116 of the Patents, Designs and Trade Marks Act, 1883, 46 and 47 Vict., c. 57, expressly provides that nothing in the Act is to take away, abridge, or prejudicially affect, the prerogative of the Crown in relation to the granting, or withholding of a grant, of any letters patent.

† See 5 & 6 Will. 4, c. 83; 2 & 3 Vict., c. 67; The Patent Law Amendment Act, 1852, 15 & 16 Vict., c. 83; 16 & 17 Vict., c. 115; 22 Vict., c. 13; The Protection of Inventions Act, 1870, 33 & 34 Vict., c. 27.

‡ Sections 10, 11 and 12 of the Statute of Monopolies, 21 Jac. 1, c. 3, were repealed by the Act of 1883.

specification, empowers the Board of Trade to order the grant of licenses (compulsory licences), enables the extension of the term of a patent under exceptional circumstances, provides for the revocation of a patent on petition in lieu of the former proceeding by *scire facias*, and makes provision for arrangements by the Crown for the protection of patents in foreign States, the Colonies, and India.

Certain amendments of the Act of 1883 have been subsequently effected by the Patents, Designs and Trade Marks Amendment Act, 1885\*, the Patents Act, 1886†, and the Patents, Designs and Trades Marks Act, 1888‡.

Under the Act of 1883 a complete specification was required to be left within nine months, and to be accepted within twelve months, from the date of application, and a patent had to be sealed within fifteen months from the date of application. It being considered expedient to empower the Comptroller to extend these times in certain cases, the Act of 1885 allowed an extension of one month and three months, respectively, after the nine and twelve months for the leaving and acceptance of the complete specification, and, where such extension has been allowed, a further extension of four months after the fifteen months must be allowed for the sealing of the patent. Another improvement introduced by the Act of 1885 is that specifications and drawings are not to be open to public inspection or published unless the application for the patent be accepted.

The Act of 1886 enabled the Crown by Order in Council to extend the protection of inventions exhibited at industrial or international exhibitions, to exhibitions out of the United Kingdom. A systematic registration of patent

\* 48 and 49 Vict., c. 63.

† 49 and 50 Vict., c. 37.

‡ 51 and 52 Vict., c. 50.

agents was established by the Act of 1888, which is, undoubtedly, beneficial in its results.

In 1890, a series of regulations known as the Patent Rules, 1890, was published under the authority of the Patents Acts, 1883 to 1888, which prescribes in detail the procedure in applying for patents. These were supplemented by the Patent Rules of 1892 and 1898, Privy Council Rules, 1897, with reference to applications for the extension or prolongation of Letters Patent, and Register of Patent Agents' Rules were published in 1889 and 1891.

This brief historical sketch of the legislation on the subject will serve to indicate the gradual way in which, in the course of their statutory development, improvements have been effected in our Patent Laws. It must also be recollected that the interpretation of the Judges is a most important factor in the development, which, indeed, is sufficiently demonstrated by decisions of considerable importance in quite recent cases.

The statutory rule, for example, that a patent may be granted only to the "true and first inventor" has been interpreted by the Courts in no restrictive sense. For these words have been judicially defined, so as in certain cases to include persons who, in the popular sense, are not inventors. Thus a person who has merely imported an invention from abroad, if the invention, being in other respects novel and of utility, was not previously known in this country, and a person who first discloses an invention to the public which has been kept secret and not communicated by its first discoverer, are held to be the first and true inventors.

In a leading case\* in which an importer of a foreign invention was recognised as an inventor for the purpose of the Patent Laws, Lord Brougham said: "The Patent Law

\* *In re Berry's Patent*, 1850, 7 Moo. P.C. 187.

is framed in a way to include two species of public benefactors: the one, those who benefit the public by their ingenuity, industry and science, and invention and personal capability; the other, those who benefit the public without any ingenuity or invention of their own, by the importation of the results of foreign inventions. Now, the latter is a benefit to the public incontestably, and, therefore, they render themselves entitled to be put upon somewhat, if not entirely, the same footing as inventors"\*.

If an invention be simultaneously arrived at by two individuals, the one who first takes out a patent in respect of it is considered to be the true and first inventor.

In some cases difficulty arises in determining as between employer and workman who is the true and first inventor. A very recent decision will illustrate this. In *In re Marshall and Naylor's Patent*† the revocation of a patent was obtained on the ground that the patentees were not the first and true inventors, but had obtained the invention from a workman in the employment of a Company of which the patentees were directors, and had obtained the grant of the patent in fraud of the rights of the workman, who was held to be the first and true inventor.

Again, the rules, as to the requirements of novelty and utility have received expansion by means of judicial interpretation.

Novelty of the subject matter is an essential condition to the grant of a patent. Any invention already known

\* These words have been quoted as late as last August by Lord Halsbury in his judgment in *Waller and another v. Lane*, 1900, 69 L.J. Ch., at p. 705. The Lord Chancellor also observed that an interesting discussion of this question will be found in Messrs. Wallace and Williamson's work on Patent Law just published.

† June, 1900, 17 R.P.C. 553. This case is not cited in Messrs. Wallace and Williamson's work, which presumably was in the press before the date of the report.

to the public by description, exhibition, or user, is not patentable. Anticipation by prior publication or user, therefore, defeats the right to a patent. With regard to anticipation by publication, in a decision of the Court of Appeal this year\* a patent was held invalid for want of novelty on the ground that it had been anticipated by the publication of an American specification. As to what amounts to anticipation by previous user, there is a long series of decisions, the most recent of importance being a case in 1898†. In certain foreign countries a time limit is imposed by law to 'ancient anticipations.' For instance, in Hungary and Portugal an invention is regarded as new notwithstanding publication or working, if between its last publication or working and the application for a patent, a term of one hundred years has elapsed. The importation of a similar rule into English Patent Law would be of benefit‡. The advantage of some system of official examination as to the novelty of inventions sought to be patented is much disputed. Under the English Patent Law there is no preliminary examination into, or guarantee of the novelty of a patent by the Patent Office. In some foreign countries, on the other hand, notably in the United States, there is a preliminary examination into the novelty, but it is to be observed that a preliminary examination of patents in those countries where it exists never involves any guarantee on the part of the State that a patent is novel or useful as against third parties, and in many cases, *c.g.*, in

\* *The Electric Construction Co., Limited v. The Imperial Tramways, Limited, and the British Thomson Houston Co., Limited*, June, 1900, 17 R.P.C. 537.

† *Hoe v. Foster*, 16 R.P.C. 33.

‡ A Bill was, in fact, introduced in 1895 by the present Master of the Rolls, Mr. Fletcher Moulton, Q.C., and Mr. Haldane, Q.C., which proposed a limit of fifty years in the case of ancient anticipations.

France, Belgium, Russia, and Switzerland, such a guarantee is expressly disclaimed\*.

A Committee appointed by the Board of Trade is at present enquiring into the question whether any and what additional powers should be given to the Patent Office to control, impose conditions on, or otherwise limit, the issue of letters patent in respect of inventions which are obviously old, or which the information recorded in the office shows to have been previously protected in this country. The report of this Committee will be watched with interest.

The utility of the invention is another condition of its patentability, inasmuch as no grant is valid which does not tend to the benefit of the community. Urgent necessity to the public is not, however, requisite to support a patent, for the cases show that a comparatively trifling invention, a child's toy, for example, may be of sufficient utility to be patentable. The ascertainment of the necessary degree of utility has led to much litigation. It has been said in an important case decided during the present year† that utility in patent law does not mean either abstract utility, or comparative or competitive utility, or commercial utility, but as applied to an invention means an invention better than the preceding knowledge of the trade as to a particular fabric, better, that is, in some respect, though not necessarily in every respect. Another suggested test of utility is that an invention is useful for the purposes of the patent law when the public are thereby enabled to do something which they could not do before, or to do in a more advantageous manner something which they could do

\* The foreign and colonial law has been collated and discussed by Mr. A. Wood Renton, in an article on Preliminary Examination of Patents and Compulsory Licences in the Journal of the Society of Comparative Legislation, New Series, No. V., August, 1900.

† *Welsbach Incandescent Gas Light Co. v. New Incandescent (Sunlight Patent) Gas Lighting Co.* [1900], 1 Ch. 843.

before, or, to express it in another way, that an invention is patentable which offers the public a useful choice.

In addition to the incidents of novelty and utility, a certain degree of invention or special ingenuity is a *sine qua non*\* to the grant of a patent. The determination of the existence of this attribute presents in many cases one of the most difficult problems in Patent Law.

The subject of compulsory Licences is one of increasing importance. The Act of 1883\* enabled the Board of Trade, on the petition of any person interested, to order licences to be granted by a patentee, if it be proved that by reason of the default of a patentee to grant licences on reasonable terms the patent is not being worked in the United Kingdom, or the reasonable requirements of the public with respect to the invention cannot be supplied, or any person is prevented from working, or using to the best advantage, an invention of which he is possessed. For many years after the passing of the Act advantage was not taken of these provisions, but during the last two or three years there have been several applications for compulsory licences†, and the importance of the provisions seems to be now fully appreciated by the public.

The existence of legal machinery for obtaining, under certain circumstances, a compulsory licence from the patentee, is clearly of value, tending as it does to prevent an abuse by the patentee of his rights, but the jurisdiction is one that should be exercised with extreme caution.

The law, with regard to compulsory licences, has been carefully discussed by Messrs. Wallace and Williamson, in their work on Patent Law‡, who criticise adversely, but with justice, the present tribunal and procedure. Applica-

\* 46 and 47 Vict. c. 57, s. 22.

† The cases will be found collected in Gordon's *Compulsory Licences under the Patents Acts*.

‡ Chap. XIX.

tions for compulsory licences are referred by the Board of Trade to a legal expert as referee, for consideration and report. This, as Messrs. Wallace and Williamson point out\*, can hardly be called a convenient form of tribunal, as the referee who hears the case has no power to do more than report, while the Board, which does not hear the evidence, grants or refuses the order for a licence. There are the further objections that the referee's report is not in the form of a judgment, but is a bare order dismissing the application or granting a licence on specified terms. Amendment of the procedure, if not a reconstitution of the tribunal, is necessary, in order to secure public confidence, and legislation on the subject seems desirable. Mr. J. W. Gordon, in his recent work on the subject†, points out that the High Court has full authority, were it minded to exercise that authority, to impose terms such as are now imposed by the Board of Trade, and that plain and stringent provisions for securing the public against the strained or unreasonable assertion of patent rights exist, but the Court has wholly abandoned this branch of its jurisdiction, and has even formally declined to entertain any question of public convenience as against the pretensions of a patentee‡.

The Committee recently appointed by the Board of Trade, to which reference has already been made, are inquiring, and will in due course report, whether any, and, if so, what amendments are necessary in the existing law as to Compulsory Licences§.

A few words may not be out of place here with reference to the extension of the duration of a patent beyond the

\* *ibid.* at p. 50.

† *Compulsory Licences under the Patents Acts* (1899) at p. 5.

‡ *ibid.*; see also the judgment in *The Incandescent Gas Light Co., Limited*, v. *Cantelo*, 1895, 12 R.P.C. 264, 266.

§ The principle of compulsory licences is adopted by many of the Colonies, and by some foreign countries. See the article by Mr. Wood Renton, referred to ante p. 13, note.



term for which it was originally granted. The Common Law limited a grant of letters patent to a reasonable period. The Statute of Monopolies, as we have seen, substituted the definite term of fourteen years, and the Patents Act, 1883\*, adopted this period for the duration of a patent. Many cases, such as the apathetic attitude of the public towards the invention, powerful trade rivalry, continued litigation, and other circumstances incident to the particular invention, may prevent the patentee from deriving any substantial benefit from his patent within fourteen years. Of Watts' improvement in the steam engine, for example, it was said by Lord Brougham† : "It was so many years useless to him, not coming into immediate operation, that he had to obtain an extension of one-and-twenty years from the Legislature, but for which he would have been a loser, and probably ruined by the greatest benefit that was ever given to mankind next to the invention of printing." Notwithstanding, however, the expediency of prolonging the term in many cases, the only means formerly open to a patentee for obtaining a prolongation of his patent was by obtaining a private Act of Parliament.

This was remedied in 1835 by Statute‡, which enabled the Crown, where the Judicial Committee of the Privy Council reported in favour of the extension, to grant new letters patent for the same invention for a term not exceeding seven years after the expiration of the first term. Under the present law§ a petition for extension may be presented to the Queen in Council, and there is power, if the Judicial Committee report that the patentee has been inadequately remunerated by his patent, to extend the term of the patent for a further term not exceeding seven, or, in exceptional cases, fourteen years, or to grant a new

\* s. 17 (1).      † *Watt's Patent*, 2 W.P.C. 32.

‡ 5 and 6 Will. IV., c. 83.

§ See Patents Act, 1883, s. 25.

patent. In considering their decision on such a petition, the Judicial Committee are to have regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case. The exceptional merit of the invention and the inadequate remuneration of the patentee are the criteria of success in these applications, and as recently as July of this year there is an instance of a petition for the extension of a patent being refused by the Judicial Committee of the Privy Council on the ground that the patent was not sufficiently meritorious to warrant a prolongation, and that the patentee's accounts of the profits of the patent did not show inadequacy of remuneration\*.

Many interesting points arise upon the difficult question as to the infringement of patents, and the remedies available to the patentee and the public. The law is fully expounded in Messrs. Wallace and Williamson's new work†, but the limits of space preclude anything more than a passing glance at it here.

The remedy of a patentee to secure compensation for the injury and to prevent its recurrence is by action for infringement of his patent right, and, in appropriate cases, orders may be obtained for an injunction, inspection, an account of profits, and delivery up or destruction of the infringing articles. There is also power, which is often most usefully exercised, to grant a certificate of validity of the patent to the patentee whose patent has been infringed‡.

Under the fourth section of the old Statute of Monopolies any person hindered, grieved, disturbed, or disquieted by pretence of any monopoly or letters patent was given a

\* *In re Kelly's Patent*, 1900, 17 R.P.C. 476.

† *The Law of Letters Patent for Inventions*, Chaps. xxi.-xxiv.

‡ The most recent case in which a certificate of validity was granted to a successful plaintiff in an action for infringement was *Acetylene Illuminating Co., Limited, and others v. Midland Acetylene (Parent) Syndicate, Limited*, July, 1900, 17 R.P.C. 534.

remedy by action for treble damages and double costs. A recent unsuccessful attempt has been made to sue under this section\*.

The remedy now open to the public, where a patentee—even in good faith—threatens proceedings in respect of the alleged infringement of a patent, which cannot be legally supported, is by action against the patentee for threats. This remedy was introduced by section 32 of the Patents Act 1883. It is, however, noteworthy that no action will lie under the section—even where the threats are entirely without foundation—if the person making them commences and prosecutes an action for infringement with due diligence†. “The sword of Damocles,” to use the words of the late Lord Bowen‡ “should either not be suspended at all, or should fall at once.”

Upon the subject of the remedies of the public it should be added that the revocation of a patent may be obtained if the patent was granted to a person other than the first and true inventor, or was wanting in the attributes of novelty or utility. The proceedings for revocation of a grant of letters patent were formerly by writ of *scire facias*; the procedure is now by petition of the Attorney-General or anyone authorised by him or of any person interested§.

Objections may easily be raised to certain phases of our patent laws, certain points may demand amendment, and improvements may be suggested by experience. But the agencies of the development of the system are still at work, and it has been well said of the Patent Laws by an acknowledged authority|| that they afford an inducement

\* *Peck v. Hinds*, 1898, 14 T.L.R. 164.

† See the proviso to s. 32 of the Patents Act, 1883.

‡ In *Skinner v. Perry*, 1893, 10 R.P.C. at p. 8.

§ See Patents Act, 1883, s. 26.

|| Speech by Mr. Fletcher Moulton, Q.C., M.P., at the Article Club, December, 1898.

for the specialisation of work which alone can produce great results, and it must be remembered that the reward is automatically proportioned to the value of the achievement.

G. H. B. KENRICK.

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### III.—CIVIL JUDICIAL STATISTICS, 1898.\*

STATISTICS are generally looked at askance by the average man, and judicial statistics, above all others, might reasonably, in the minds of most people, be accredited with that degree of dryness so pre-eminently associated with all matters appertaining to the law; but Master Macdonell invariably succeeds in putting the mass of figures contained in the innumerable tables, both annual and comparative, comprising the Judicial Statistics of England and Wales, supplemented by his introductory comments, in such a way that they cannot fail to afford to the most pronounced disbeliever in statistics, even on a cursory inspection, ample information and much food for reflection; so much so that we are inclined to regret that this valuable official publication is not more accessible to the general public, and particularly to that section of the community who are specially interested in the administration of justice. We will endeavour, however, to give our readers the cream of Master Macdonell's labours.

An inspection of the short statement setting forth the nature and amount of the civil business of all courts in England and Wales in 1898 (the figures of which would only be very slightly increased if there were added the proceedings of a civil nature in criminal courts) shows that there was an increase, both in the proceedings begun

\* Judicial Statistics, England and Wales, 1898. Part II.—Civil Judicial Statistics. Edited by John Macdonell, C.B., LL.D., a Master of the Supreme Court. London: Eyre and Spottiswoode, 1900.

and those heard, in almost all the courts, the exceptions being, as to proceedings begun, in the House of Lords, in Admiralty actions, in Lunacy matters, and in the Durham Chancery Court; and as to matters heard, Divorce and Admiralty proceedings, together with proceedings in the Railway and Canal Commission, Durham Chancery Court, the Mayor's Court and Borough Courts of Record.

Taking the number of actions begun in Scotland at 97,871, and the population at 4,249,946 inhabitants, the number of cases per 100,000 was 2,302·88, or about half as many as in England and Wales, but taking a country with a very different legal system (Italy, in 1896), it appears that the cases begun per 100,000 were 8,318, or about twice as many as the proportion in England and Wales.

The centralisation of cases in London, of which we hear so much from time to time, is not so exceptionally great as is popularly supposed, and this Master Macdonell shows by assuming the Sheriff's ordinary court, Sheriff's Debts Recovery Court, Sheriff's Small Debt Court, and Justice of Peace Small Debt Court to be substantially the equivalent local courts in Scotland to the county courts, the borough local courts, and other local courts in England and Wales, and comparing the respective figures. It is then found that 94,202 cases, out of a total of 97,871, or 96·25 per cent., were begun in local courts in Scotland, while in England and Wales the cases so begun were 1,198,707, or 93·35 per cent. of the whole.

Under the heading of Chief Appellate Courts we find that in the Judicial Committee of the Privy Council the business exceeded that of any other year for the last quarter of a century, and some of the cases were matters of great importance, such as *Attorney-General for the Dominion, &c. v. Attorney-General for the Provinces as to Fisheries and Fishery Rights in Canada*. There were more appeals entered, more appeals heard, and a larger amount

of fees paid than in any previous year in the history of the Judicial Committee since 1875. The interlocutory motions were also more numerous. Notwithstanding occasional fluctuations, the business of the Judicial Committee tends to increase slightly, while that of the House of Lords remains almost stationary, with a slight tendency to decrease. It is noteworthy that in no fewer than 54 out of 139 appeals no costs were given. Master Macdonell is unable to give us any exact information about the financial position of the Judicial Committee, as no return is made of the total expenditure; but it is believed that the fees defray all salaries, &c., three years out of the four.

Master Macdonell here makes a comparison of the civil business of the Cour de Cassation in France and the Courts of Appeal in Italy, although he is careful to point out that these comparisons are apt to be fallacious as the jurisdictions of the tribunals compared differ greatly, but they are alike in being the ultimate Courts of Appeal. Making due allowance, however, for difference in procedure, it is remarkable that the annual appeals to the final Court of appeal in England and Wales are not 7·03 per cent. of those which came to the corresponding Court in France, and only 2·18 per cent. of those that reach the final Courts in Italy. Of the legal system of most countries on the Continent it may be said that there is less centralisation, and that there are far more appeals than in England. The results of the appeals finally adjudicated by the House of Lords were 68·5 per cent. affirmed, 31·5 per cent. varied and reversed. The reversals in Scotch cases have been, as is sometimes the case, about twice as great as in English appeals, which leads to the reference, perhaps, that the Scotch judges are very weak, or the Lords are unable to comprehend Scotch law. A notable feature of the returns for 1898 is the marked increase in the business of the Court of Appeal, and the returns for 1899 shows a still larger figure chiefly

owing to the number of appeals under the Workmen's Compensation Act.

A statement of the business in the Chancery Division shows on the whole that it is about stationary, with a tendency to decrease in some heads. The large number of witness actions—571 out of a total of 624—is a noteworthy feature of the statement. The compulsory summons for directions has not, it would seem, greatly reduced the number of applications in Chambers. Though fewer writs were issued in 1898 than in 1897, the number of summonses for directions, including notices under such summonses, is much the same as in some years before the summons for direction was made compulsory. This appears to justify the dictum of Mr. Francis A. Stringer that Order XXX. is a qualified success and a qualified failure. It is a qualified success, says Mr. Stringer, because it has prevented unnecessary delay and expense in a limited number of Queen's Bench actions of minor importance. To this restricted extent it has diminished the cost and expedited the course of legal proceedings. It is a qualified failure because its restricted success, as above defined, has been purchased at the cost of increased expense, without any material counterbalancing advantage, in all Probate actions, in nearly all Chancery actions, and in the majority of Queen's Bench actions which go to trial; and at the further cost of the creation of causes of friction in all actions to which it applies, due to the absence of any comprehensive re-adjustment of existing procedure rules for the purpose of making them harmonize with its compulsory and overriding provisions. Order XXX., moreover, has not had the desired effect of materially diminishing the number of interlocutory applications.

An examination of the figures relating to costs shows that the total amount of costs taxed fell from £998,680 in 1897 to £942,650 in 1898, but the slight variations from

year to year in the percentages taxed off bills of costs is noteworthy, the lowest being 15·54 in 1895, and the highest 17·27 in 1897.

From Table XVIII. we gather that there is practically no Equity business in the Courts in the neighbourhood of London, Reading being the only District Registry within a radius of 50 miles from London with such business. In only 58 of the 85 District Registries were Equity proceedings begun during the last four years. In fact the statistics prove that there has been no very great increase in the Equity proceedings in the District Registries.

The originating proceedings under the various Companies Acts increased from 389 in 1897 to 448 in 1898, and there was a slight increase in the number of winding-up orders. Orders made by the Judge or Registrar increased in the same periods from 944 to 1,448; but, on the other hand, in the receipts and disbursements in Receivers' accounts, there was a decline of 20·19 and 21·67 per cent. respectively.

Business in the Queen's Bench, it is known, has on the whole been stationary for some time past, but in 1898 the figures show a distinct increase, and noticeable too is the increase in summonses under Order XIV., which were no fewer than 15,445. These last now amount to 36·11 per cent. of the total number of Masters' and District Registrars' Summonses. Again, it is apparent here, as in the Chancery Division, that the compulsory summons for directions has not diminished very much the number of applications at Chambers; in fact, a comparison with the figures for the previous year shows only a decline of 7·49 per cent. A slight decline is shown in the number of actions entered, whilst there is a distinct increase in actions tried. Out of 2,055 defended cases tried in London and Middlesex, 44·53 per cent. were tried before a jury. On the other hand, the cases so tried on circuit amounts to no



less than 66 per cent. The amount recovered by trials in Court was £694,963 6s. 10d.

Of the 5,366 actions for trial, over 7 per cent. were for libel and slander. Of these, no fewer than 70·25 per cent. were in London and Middlesex; while the remainder—29·75 per cent.—of such actions were entered for trial on circuit.

Master Macdonell draws attention to the remarkable growth of the number of actions entered in the Order XIV list for the speedy trial of actions, the percentage of cases thus tried showing a distinct increase, notwithstanding the objection of the Judges to try in this manner cases of a complex character.

The information afforded regarding circuit business provides a strong argument for a revision of the system. On the whole, there has been an increase of business, but in no less than thirty-three assize towns, only five, or fewer, actions were tried or otherwise disposed of, and in five towns no actions were entered or tried in 1898. Three towns indeed—Bury-St.-Edmunds, Aylesbury, and Oakham—have the distinction of having had no actions tried in them since 1896.

The efficacy of the procedure under Order XIV is specially noticeable by an inspection of the figures relating to the number of Judgments. These amount in all to 31,946, being a large increase on the previous year. No fewer than 7,511 were Summary Judgments obtained under Order XIV. In other words, nearly 25 per cent. of the Judgments obtained for Plaintiff were obtained in this manner, and out of a total of £6,157,935 for which judgment was entered for Plaintiffs no less than £2,168,353, or 35·21 per cent. was recovered under Judgments signed under Order XIV., that is, nearly twelve times as much was recovered in this manner as by the verdict of juries. The total amount for which judgment was signed

(£6,568,427) was nearly four times as much as that for which judgment was entered in the County Courts (£1,786,317.)

It is noteworthy that of the total number of actions in which judgment was signed for money claims, nearly one-half (13,681) was for sums from £20 to £50, *i.e.*, presumably almost all cases within the jurisdiction of County Courts. Master Macdonell shows how largely the work of the Courts is automatic by pointing out the fact that out of 30,514 judgments for plaintiff 20,936 were for default of appearance, or other modes of default. The total sum in respect of such judgments was £3,484,353, or an average of £163 1s. 8d. in each action.

Some interesting information is given as to the parties concerned in litigation. It appears that in a very large proportion of cases public companies were either plaintiffs or defendants. Thus in 1897 out of 400 actions in the Queen's Bench Division, 89 or 22 per cent. were actions by limited companies, while 41 or 10 per cent. were actions against such companies. An analysis of the figures for 1898 shows a somewhat similar result and confirms the impression as to the extent to which litigation is conducted by such companies. On the other hand an inspection of the figures as to the actions to which women were parties shows that the proportion of such cases to the whole body of litigation is very small.

Much interesting information as to the duration of actions tried in the Queen's Bench has been worked up by Mr. Joseph Davies of the Associates' Department. Taking 108 cases (none of which it should be understood were cases entered in the Order XIV. list, which came on for trial much more rapidly than actions entered in the other lists) details are given as to the average time which elapses between the issue of writ, the date of entry for trial, and the date of trial. Of the total number of actions (108) the average time was : between date of writ and date of entry

143·6 days ; between date of entry and date of trial 51·2 days ; and between date of writ and date of trial 194·8 days. These averages are greatly heightened by cases, the trial of which was delayed owing to the action of the parties, delay in the return of commissions, or other reasons for which the courts are not responsible. In this latter connection it will be remembered that the late Lord Chief Justice stated that during the Hilary sitting of this year applications had been made, principally with the consent of the parties, to postpone more than 100 cases. Eliminating cases of an exceptional kind in which the intervals between date of writ and date of trial was 200 days and upwards, the average duration of actions stands at 125·7 days.

In the Probate and Divorce Division there is ground for noting, in regard to probate, the small number of wills which are the subject of dispute. While the total number of wills proved was 41,652, and the number of letters of administration was 11,717, the number of actions was only 169. Only in five cases was there a decree against the will.

There is no sign of any marked increase in the business of the Divorce Court ; on the contrary there is for a time at least a decline. On the other hand the number of judicial separations effected by orders of magistrates steadily increases. The details as to the duration of marriages and condition of parties have now been given for five years, and Master Macdonell's comments on these figures are both interesting and instructive. Somewhat more than 65 per cent. of the petitions are in marriages of 5 to 20 years duration, but it would seem that as to duration of marriage, there are some differences between petitions by husbands and by wives. In the early years the proportions are much the same ; but a larger percentage of petitions are brought by wives after 20 years of married life.

A table headed "Place of Celebration" discloses the

noteworthy fact that the larger proportion of cases were those in which the marriage took place in a Registry Office. Another remarkable fact, confirmed by a process of tabulation, is that divorces are commoner in the case of childless marriages, the proportion varying from 36·91 to 41·24 per cent. The corresponding figure in the Scotch Judicial Statistics for 1898 is 37·3 per cent. (including divorces and separations). In the French Judicial Statistics for 1896 (including divorces and separations), it is 37·6 per cent. For Italy (separations only) the percentage for the same year was 46. It is a noteworthy fact that only a small proportion of the applications for judicial separation come to trial. They are, as a rule, settled at an early stage; and frequently are not genuine proceedings, but are intended to procure a settlement as to means, or custody of children. One point is noticeable in this connection—there are advantages in resorting to Police Courts, as the magistrates enforce their orders, while the orders of the Divorce Court are rarely enforced, unless there is property which can be seized or attached.

Dealing with the work of Divisional Courts, Master Macdonell comments on the small number of cases of appeals from the Income-Tax Commissioners which came before the Court. It is a remarkable fact that, although more than six hundred millions sterling derived from capital is assessed to income, only eight cases were brought by way of appeal before a Divisional Court. The figures show an increase in the number of appeals to Divisional Courts from County Courts, the number entered having been 227, as against 211 in 1897.

The deputy head clerk of the Bills of Sale Department (Mr. W. J. Weller) has furnished a useful contribution to the statistics by an elaborate analysis of the Bills of Sale filed in the Department. The analysis shows, among other facts, that the largest class which borrows on this

security consists of lodging-house keepers, or farmers and licensed victuallers; that a very large percentage of the borrowers are women; and that the professional classes—particularly barristers and solicitors—rarely make use of this security. Apparently, only those who can offer no other security, and who do not mind their names appearing in the “black lists” published by the trade protection societies, borrow on Bills of Sale. An examination of the Bills of Sale filed, establishes the fact, that the sum secured by means of this species of security amounts in the course of a year to the total of £1,000,000. Nearly a fourth of the Bills of Sale were given by women. It is significant that during the period the Select Committee of the House of Commons on Money-lending was pursuing its inquiries, a pretty general fall in the rate of interest was perceptible, but it was merely temporary, and the rates are now as high as ever. The rate of interest begins with the 5 per cent. per annum charged on what may be called friendly Bills of Sale, and in legitimate trade transactions (for instance, loans by brewers to publicans), and ends with anything a certain class of lenders can exact. As a rule, Loan Companies of the better class charge from 25 to 30 per cent. per annum. But certain well-known Shylocks go very considerably higher, and 60 per cent. is low for them. In one instance the rate was as high as 400 per cent. By way of contrast, Mr. Weller instances the case of a Bill of Sale on the file where the rate to be paid is a farthing per cent. per annum.

The chief fact to be noted with respect to the Lunacy Returns is a considerable increase in orders made by Masters in Lunacy, in summonses, and in matters under Section 116 of the Lunacy Act of 1890, but as Mr. Southwell Keely, the Chief Clerk, points out, the whole volume of business dealt with shows a steady growth. There is, however, a slow but sure decline in the number of subsist-

ing lunacies under inquisition, the deaths in that class outnumbering the new cases. On the other hand, the increase is very marked in matters under Section 116 of the Lunacy Act, 1890, which affords a somewhat readier and less costly means of obtaining authority to manage and administer the property of a lunatic, and makes provision also for the case of a person not lawfully detained as a lunatic, but suffering from mental infirmity, arising from disease or age, while avoiding the stigma of lunacy. With reference to the small number of cases which come under the Lord Chancellor's jurisdiction in lunacy, as compared with the number of lunatics admitted into asylums, and the total number of officially-known lunatics, Mr. Keely observes that, as a rule, it is only in the case of a lunatic with property, that application is made to the Court in Lunacy; and as only a very trifling number of criminal lunatics, and no paupers, possess means, about 96,400 (out of 105,086, the total number of lunatics on 1st January, 1899, divided into private paupers and criminal lunatics) are thus accounted for. Of the less than 8,700 private cases which remain, at least 2,449, and probably about 2,600, are the subject of proceedings in lunacy for the purpose of making their property available. As to the remaining "private" lunatics, it may be fairly assumed that either they are maintained by their friends, or that no difficulty, rendering resort to the lunacy jurisdiction necessary, has arisen in making their means applicable for their maintenance.

In 1898 there was again a slight increase in County Court plaints, which were 1,156,642, as against 1,119,420 in 1897. The increase in 1898 was greater than is proportionate to the increase (estimated) in population. There is a slight decrease in the plaints for sums between £20 and £50, while the plaints above £50, *i.e.*, those as to which there is jurisdiction only by consent, were in excess

of any previous year. These complaints have been steadily increasing; they are now nearly twice as many as they were ten years ago, as has been pointed out in earlier reports. Of the total actions determined on hearing, only a small proportion (15·66 per cent.) was heard before a judge. This is a larger proportion than usual. By far the greater number of the cases were heard before the Registrar. There has been no steady growth in the number of Equity suits and matters; and the Admiralty cases are actually fewer than they were in 1894. The actions remitted from the High Court and Interpleaders continue to increase. They were 1,674 in 1898, as against 1,610 in 1894-98. Of the remitted actions, by far the largest number was for goods sold and delivered (609), money lent (167), actions on Bills of Exchange, &c. (117), and for work and labour done (317).

The number of debtors imprisoned in 1898 was somewhat less than the average for the last five years—7,808, as against 7,956 in 1894-98.

On the subject of Local Courts, we find much useful and interesting information, which has been brought up-to-date by Mr. Alexander Pulling. As Master Macdonell points out, the work dealing with the population of County Court districts has necessitated intricate calculations and great labour, owing to the number of orders in Council changing boundaries. An extract which he makes from a memorandum by Mr. Pulling, on the subject of the population within the jurisdiction of the various other Local Courts is well worth reproducing here:—

“There are in all 16 local Courts of which the procedure is now used. Of these the London Mayor’s Court is by far the most important, the amount recovered therein exceeding half-a-million, or nearly three times that of all the other Courts put together. Excluding this Court, which stands on a footing of its own, it is to be pointed out that, as compared with County Courts the court fees in these local courts are small, and the scale of costs

very large, 5s. being the average amount of costs in respect of each £1 recovered, whilst the proportion of court fees is only 1s. 6d. This is to be compared with 5s. 2d., the amount per £1 of court fees, and 1s. 10d. the amount of costs in County Courts. Of the courts other than the Mayor's Court, the Salford Hundred Court is the most important, its business being three times that of the other 14 courts. The limits of territorial jurisdiction of the Salford Court are those of the Hundred of Salford, excluding the Borough of Oldham; that of the Ramsey Court of Pleas, those of the liberty of Ramsey, viz.: four parishes in Hunts and part of three others. The limits of the territorial jurisdiction of the Derby Borough Court, the Kingston-upon-Hull Court of Record, the Northampton Court of Record, the Norwich Guildhall Court, the Preston Court of Pleas, the Scarborough Court of Pleas, the Great Yarmouth Court of Record, and the York Court of Record are those of the respective boroughs.

"Those of the Newcastle-upon-Tyne Burgess and Non-burgess Courts extend over both the County Boroughs of Newcastle-upon-Tyne and Gateshead; that of the Bristol Tolzey Court extends over the City, and also over certain liberties and precincts along the margin of the River Avon; that of the Liverpool Court of Passage over the City and Port of Liverpool—it seems a little doubtful what is the extent of the Port for this purpose. The jurisdiction of the Exeter Provost Court extends over the whole County Borough, except the parish of Saint Leonard, whilst that of the Oxford Vice-Chancellor's Court depends upon one of the parties being a resident member of the University, and is, strictly speaking, not territorial. As appears from the subjoined table of populations, the majority of these Courts are held in, and have jurisdiction over, the area of county boroughs with large population; but are little used, apparently, either from intermediate Courts of this character not being required or from the scale of costs being exorbitantly high.

"The procedure of four of these Courts, viz.:—The Bristol Tolzey Court, the Liverpool Court of Passage, the London Mayor's Court, and the Salford Hundred Court is wholly or in part that of the Judicature Acts.

"The Ramsey Court of Pleas possesses unlimited jurisdiction, and there appears to be no appeal of any sort or kind. The procedure is that of the Superior Courts of Common Law before the Passing of the Common Law Procedure Act, 1852. To the whole of the remaining Courts certain portions (which vary in



the case of nearly every Court) of the Common Law Procedure Acts have been applied. The Bills of Exchange Act, 1855, is also in force in the Derby, Exeter, Kingston-upon-Hull, Norwich, and York Courts. The effect of the Statute Law Revision and Civil Procedure Act, 1883, is that the Orders in Council by which the provisions of the Common Law Procedure Acts and Bills of Exchange Act were applied to the above Courts take effect as if they were contained in a special Act relating to such Courts; with this exception, none of the local Courts, to which this memorandum relates, are regulated by special Act, except the Liverpool, London (Mayor's), and Salford Hundred Courts."

In Bankruptcy, we find that the total receiving orders in 1898 were 4,292, being slightly greater than the number for the year before (4,074). The number of receiving orders per 100,000 of population has diminished from 15.89 in 1889, to 13.66 in 1898. The greatest variation in the number of receiving orders, under the Bankruptcy Acts of 1883 and 1890, during the last ten years was 22 per cent. The greatest variations in the Liabilities and Assets in the same period were 58.4 per cent. and 54.3, respectively.

By the Deeds of Arrangement Act, 1887, the Bills of Sale Department of the Central Office was made the office for the registration of such deeds. Mr. Weller, of that Department, has prepared, for the quarter ending 30th April, 1898, an analysis of deeds of arrangement, similar to that mentioned above with respect to the Bills of Sale. The deeds filed include deeds of assignment, composition and inspectorship. One deed frequently embraces the first and second, but deeds of inspectorship invariably stand alone. The figures dealt with by these deeds are very large. During the quarter there were 899 deeds filed, and the averages in amount on these figures for the year, represent, in assets, nearly two millions, and in liabilities (secured and unsecured) more than four millions sterling. Those who avail themselves of the provisions of this Act are principally traders, amongst whom grocers

and cheesemongers are most numerous; then come boot and shoe manufacturers, followed by drapers. Only 12 professional men are to be found in the whole number, and of these 5 are medical men. It appears that on the whole, judging by the number or amount of liabilities, there has been a decline in insolvency.

We find presented in one table the total liabilities and assets of estates of companies wound up (compulsorily or under supervision), estates in bankruptcies and under deeds of arrangement. From this we gather that there is a marked decline in the liabilities—the difference between them in 1898 and 1894 is 31·47 per cent.; that there is a decline also in assets. The small amount of the total liabilities as compared with the national income is also remarkable. On any reasonable computation of the latter the total amount of liabilities is a very small fraction. Of course, the figures given in the table above referred to give no correct idea of the total loss to shareholders and creditors in consequence of liquidations. An increasing number of companies are wound up voluntary, as to which information is altogether imperfect; many are wound up voluntarily for the purpose of reconstruction and amalgamation; and it is impossible to state what is the loss of capital. There is no marked movement of bankruptcy business from the High Court to the County Courts—about five-sixths of the cases coming before the latter courts.

An attempt is made in one of the comparative tables to summarise the total expenditure and receipts for England and Wales since 1870, and to show, in detail, as far as possible the various heads. Care has been taken to make the table as complete as possible, and it is believed that for most purposes it will be found sufficiently accurate, but Master Macdonell warns us that it is impossible, in this connection at least, to give figures in all respects exact. Owing to differences of modes of keeping accounts, from

time to time, some errors may have crept in. A great defect in one point of view is the fact that the table gives no account of certain heads of expenditure, chiefly local, connected with the administration of justice, *e.g.*, the costs of prosecutions do not appear. But the table deals only with the receipts and expenditure of the Courts—not with the costs incurred therein.

Touching the income, the facts chiefly to be gathered from the table are that more than a million sterling is annually received in fees. In other words, by law fees or taxes is raised an amount rather less than is obtained from the wine duty or house duty, or about two-fifths of the gross receipts from the Telegraph service. Of the total sum received in 1898, 42·85 per cent. is collected in the superior Courts, 14·60 per cent. is derived from Bankruptcy, and the residue is collected in the inferior Courts. A great increase in receipts took place in 1885. This was chiefly in respect of Bankruptcy business, the Bankruptcy Act of 1883 having come into operation on the 1st January, 1884. The largest annual income was raised in 1888, when it was £1,224,733.

As to the expenditure, the total in 1898 was £1,430,502, or equal to 120·68 per cent. of the receipts, or about a thirtieth of the total naval and military expenditure for 1898. While the military and naval expenditure was probably each about twelve shillings a head, the legal expenditure was in the same year about 11d. The gross cost was probably somewhat more than the cost of a first-class battleship. The net cost was about one-third that of a first-class cruiser. The proportion of salaries of judges and officers, as far as separable, was, in 1870-73, 38-40 per cent.; in 1894-98, 45-31 per cent. Taking the total annual property and profits in England and Wales assessed to income in 1898 as £628,802,067, the actual charge of the gross legal expenditure is 0·23 per cent. of the whole; the

net 0·04 per cent. Referring to the expenditure and receipts of individual Courts, it may be pointed out that the Supreme Court invariably shows, in the period comprised in the table, a considerable deficit. The Bankruptcy Court pays its way. It has had a balance in its favour every year since 1881, with the exception of 1890. The Mayor's Court shows a surplus and a deficit for periods alternately. On the whole, there has been a deficit of over £20,000. Since 1890 there has been an average yearly deficit of over £2,000.

Comparing the foregoing figures with those for Scotland, it appears that the expenditure (including departments of the General Register House) was 196,176, while the receipts were approximately £97,708. Comparing the Sheriff's Courts with the County Courts, it is found that the amount of receipts per case was 7s. 10d. in the former, as against 7s. 9d. in the latter.

Master Macdonell concludes his able and interesting introduction to the Statistics by a generous tribute to the very able assistance rendered by Mr. Farrant and Mr. Sudbury, of the Statistical Department of the Home Office, in the compilation of the work.

#### IV.—THE REPORTER AND THE LAW OF COPYRIGHT.\*

A JUDICIAL decision upon an obscure section of an Act of Parliament of not very wide application, seldom excites much interest among the general public. Its soundness or unsoundness is usually, and I think on the whole wisely, left to the consideration of lawyers. But that was not the fate of the decision in the recent case of *Walter v. Lane*. No sooner had Mr. Justice North held

\* A Paper read before the Institute of Journalists, at Lincoln's Inn Hall, 11th Sept., 1900. Revised by the Author.

that the Copyright Act gave the reporter of a speech the exclusive property in his own report, than his judgment was made the subject of prolonged and violent discussion in public and in private. Lay discussions of legal points seldom advance matters much, and this discussion was no exception to the rule. I followed it as intelligently as I could, and clearly the drift of lay opinion was against the judgment. Why it was so was not so clear. Whatever the reason was it must have been very conclusive, since practically all joined in declaring that the judgment was wrong and must be reversed.

The defendant appealed, and the judgment was reversed. Now I think I may say that among the lawyers who have made a systematic study of the law of copyright—and these are not very numerous—the judgment in the Court of Appeal was received with far more surprise and dissatisfaction than the judgment of Mr. Justice North. They felt that it was inconsistent with a multitude of recent decisions which had been universally accepted as correct, and which had put, or tended to put, a simple and natural construction on the words of the Copyright Act, and at the same time to preserve to everyone who honestly put work into the production of any letterpress the exclusive property in the result of his own labour. They were, therefore, neither astonished nor dissatisfied when the House of Lords, almost unanimously, reversed the judgment of the Court of Appeal, and reinstated the judgment of Mr. Justice North.

In order to show that the decision of the House of Lords was anticipated by lawyers who had considered the point, you will perhaps permit me to refer to a passage in a little work on the "Law of the Press," which is the joint production of your previous honorary counsel, Mr. Joseph R. Fisher, and myself. In the second edition of that work, published in 1898, at page 89, the passage I wish to refer

to begins. It runs as follows: "It has been held that there is copyright in a list of bills of sale and deeds of arrangement (*Trade Auxiliary Co. v. Middlesbrough, etc., Association*, 40 Ch. D. 435); in a directory (*Kelly v. Morris*, L.R. 1 Eq. 697); in mathematical tables actually calculated by the plaintiff (*Baily v. Taylor*, 3 L. J. 66); and in a translation (*Wyatt v. Barnard*, 3 V. & B. 78). In each of these cases the material was common to everyone who chose to make use of it, and with regard to the first three of them, at any rate, it is evident that two or more persons working separately might produce an identical result. The copyright, therefore, is neither in the expression nor in the substance: it is in the compiler's labour. Anyone is at liberty, for instance, to compile a press directory, none the less because another has previously compiled one. The second compiler, however, is not entitled to appropriate the result of the previous compiler's labour. He can compile one for himself, which may be identical in all material points with one already published; but he must go to the original sources of information, and not merely abstract what the first writer has collected . . . It has not as yet been decided that there is copyright in a report of a judgment or speech . . . It is difficult to see, however, what distinction there can be between the skill and labour necessary to collect the names and residences of the inhabitants of a district or to compile a list of judgments, and the skill and labour of the reporter who takes down spoken words and reduces them into a permanent form, that the result in the one case should be protected and in the other should not. Probably, then, the Court would hold that there is copyright in the report of a speech."

To show that the considerations here set out were those on which the House of Lords proceeded in *Walter v. Lane*, it is necessary merely to cite a short passage or two from

the judgments of the learned Lords. Thus Lord Davey says :—"Copyright has nothing to do with the originality or literary merits of the author or composer. It may exist in the information given by a street directory (*Kelly v. Morris*, L.R. 1 Eq. 697), or by a list of deeds of arrangements (*Catc v. Devon and Exeter Constitutional Newspaper Company*, 40 Ch. D. 500), or in a list of advertisements (*Lamb v. Evans*, 1893, 1 Ch. 218). I think those cases right, and the principle on which they proceed directly applicable to the present case. It was, of course, open to any other reporter to compose his own report of Lord Rosebery's speech, and to any other newspaper or book to publish that report, but it is a sound principle that a man shall not avail himself of another's skill, labour, and expense by copying the written product thereof." (L.J. 69 Ch. 699 at p. 706).

The following excerpt from the judgment of the Lord Chancellor is perhaps even more apposite to the point I desire to make :—"The language of the Court of Appeal is : 'Each man who himself makes a directory and prints and publishes it is the author of what he publishes : the reporter of a speech is not.' With great respect to the Court of Appeal, this is allegation, not argument. The judgment goes on to say that 'the distinction is all important,' but it does not explain what the distinction is. For my own part I am unable to discover it. A man goes along a street, collects the names, addresses, and occupations of each dweller therein. What is the original composition of which, according to the Court of Appeal, he is the author? The names of the streets? The numbers of the streets? The names of the dwellers in the several houses? What is the distinction which the Court of Appeal makes in giving copyright to the result of this labour and reducing it into writing?" (L.J. 69 Ch. 699, at p. 703).

While, therefore, the judgment of the House of Lords and of Mr. Justice North in *Walter v. Lane* is merely an

application of a principle long acted upon by the Courts below, it must not, however, on that account be regarded as of small importance. It is, on the contrary, of the greatest importance, since it has swept away a multitude of *obiter dicta* which occur in some of the older decisions, and have proved very embarrassing to expounders of the law, and it has explained many words used but not defined in the Copyright Act, the meaning of which has long been uncertain, and it has been affirmed on the highest authority known to English Law the principle upon which the lower courts have long proceeded, but which hitherto has not been always clearly explained or thoroughly understood. That principle the House of Lords has not expressed in the form of a proposition of law. Judges hesitate so to express any principle, since a principle so expressed from the judgment seat acquires a binding effect, which, if the expression of it proves too wide or too narrow, may subsequently cause embarrassment to other judges. But it has explained the principle it has not formulated, so clearly, that one, who, like myself, is not as a Lord of Appeal is, one in authority, who can say to a legal doctrine, "Come, and it cometh; go, and it goeth," is thereby enabled to state it in its essentials at any rate, in one or two short and simple sentences.

Substituting, then, for technical and ambiguous words used in the Copyright Act the meanings which the House of Lords has put upon them, the nature of copyright and the mode in which it is acquired may, for our present purpose, be summed up thus:—

*Copyright is the exclusive liberty of printing or otherwise multiplying copies of a published document.*

*Anyone who produces and publishes a document is entitled to the copyright therein, unless such document is merely copied from another document produced by someone else, or already published, or unless its publication was an illegal act.*



Perhaps you will permit me to say a word or two as to the application of these two propositions to the case of reporters and other journalists.

Now, first as to the definition of copyright. I am inclined to think that if all the correspondents who impugned the judgment of Mr. Justice North had remembered what copyright meant, not a few of their letters would never have been written. The letters I refer to are those in which the writers gird at the absurdity of Lord Rosebery not being entitled—if anyone was entitled—to the copyright in his own speeches. Copyright is the right to multiply copies of a document—"book" is the word used in the Act, but I use document as covering the various publications which are included under the definition given by the Act of the word "book." Now what was the document which these writers thought Lord Rosebery should have the copyright of? Not any document produced by himself, but a document produced by the labour of another person, namely, the reporter who reported his speeches. What right in law or justice could he have to appropriate the result of another man's labour? But for the reporter that particular report would not have existed, and there would have been no document of which copies could have been made. What, then, these correspondents meant was this: that though if no one had reported Lord Rosebery's speech, Lord Rosebery would have had no more copyright in his speech than you or I have in our conversation, owing to the fact that there would be nothing of which a copy could be made by printing or otherwise; yet because a reporter did, at his own trouble and expense, make something of which a copy could be made, it belonged either solely, or jointly with the reporter, to Lord Rosebery. In other words, they thought that the labour of the reporter should create for Lord Rosebery a property he would not otherwise possess. It is somewhat

difficult to see where the justice of such a contention comes in.

What no doubt induced them to take this view was what some of them felt to be the absurdity of refusing to a speaker the right to reproduce his speech. This, however, is precisely what the judgment did not do. All it refused to the speaker—who, by the way, had not asked for it—was the right to reproduce a report of his speech which was made by the labour of another person than the speaker. All it said was that a person who writes out an account of what he hears at a public meeting is as much entitled to prevent anyone else appropriating the result of his labour as is a person who writes out an account of what he sees there. If the speakers at the meeting choose to write out an account of what they say, either before or after they say it, they in the same way will be entitled to the copyright in their account. In the words of North, J., “A question was put as rather bringing the argument to a *reductio ad absurdum*. Could *The Times* restrain Lord Rosebery from publishing his own speeches, taken from the report in *The Times*? With great deference to the learned counsel, I do not quite see where the absurdity comes in. In the particular case put, if the speaker recollects what took place, of course he can publish it again either orally or in writing, and what is more he may for that purpose, if he likes, refresh his memory as to what took place by looking at the report in the newspapers, and if he has forgotten what took place, and if he cannot recollect sufficiently to publish the speech there is another thing open to him—he may then go to other persons who have been present and try to get some help as to what actually took place himself, and if he cannot get his memory refreshed by materials furnished by other persons to him, I do not see where the hardship is, if the speech has been thrown to the winds, without being recorded in any way by him or his friends, if, to republish

that, he has to get a copy of it from the person who has made a report, to the copyright of which he is entitled." (*Walter v. Lane*, 1899, 2 Ch. 749, at p. 768.)\*

I will refer later to an additional point—namely, that a speaker is always able to prevent a reporter obtaining any copyright in his speech if he chooses to do so. I am now only speaking of a public meeting where reporters are permitted or invited to come for the express purpose of making their own reports of the speeches delivered.

The second point about the definition of copyright is another which, if the correspondents in question had remembered, some of their letters would not have been written. Copyright is the exclusive liberty to multiply copies, not merely of a document but of a published document. Until a document is published, no question of copyright arises. Till then the document is the absolute property of its owner. He is entitled to restrain any person from publishing it, just as he is entitled to restrain anyone from burning or abstracting it, but he has no copyright under the Copyright Act in it. That arises only when the document is published. If this had been

\* In some remarks made by him when this Paper was read, Sir Edward Clarke, Q. C., while not expressing any dissent from the law as laid down by North, J., stated that: "If Lord Rosebery were to propose to publish his speeches upon public affairs; and were for that purpose, even without permission, to use a report which had appeared in a newspaper, he did not think any Court would grant an injunction against him for reproducing those speeches. It would be against public policy if any Court granted such an injunction. It would probably leave him liable to damages in any suit which might be brought by the newspaper." If I may be permitted to say so, I too doubt if a newspaper could obtain an injunction against the speaker himself for reproducing reports of his speeches published by it. But I would not incline to put this on the ground of public policy; that ground, if good, would be equally a defence to an action for damages. I would rather put it on the ground of "fair use." I think it would be very difficult to show that any use made by a speaker of reports of his own speeches was so unfair as to entitle the owner of the copyright to restrain him from so using them. If, for instance, the speaker pleaded that he republished the speeches in order to show the world that his political conduct had been throughout consistent—which would be perhaps rather a startling defence for a politician to set up nowadays—I think that would be a sufficient answer to an action either for an injunction or for damages.

remembered, parties to the controversy over the judgment in *Walter v. Lane* would not have written about the consequence of that judgment, being that the copyright in a dictated article or poem would be in the secretary, shorthand writer or typist who put it into writing. Where an author dictates to an amanuensis, the relation between them is that of master and servant, and the result of the servant's work belongs to the master who pays him for it. He owns the document produced just as the merchant owns the ledger kept by his book-keeper, and the builder owns the house built by his workmen. No question of copyright arises: the question is simply one of property as between master and servant, and as we shall see, this being the case, if the servant published the document without his master's consent he would be guilty of an illegal act, which could confer no rights upon him.

Coming now to the second proposition, and dealing only with the writer of a document, and not with his assigns or representatives: in order that a person may have the copyright of a document he must be the producer of it. The word in the Copyright Act is "author." No doubt in connection with literature the word "author" is often used in a specific sense, as meaning the person who originally evolves out of his own mind the ideas and concatenation of words that go to form the contents of a literary work. But that is not the true or generic meaning of the word. As the proverb says, "Nothing exists without an author"; and in this sense the word is merely equivalent to maker or producer, and has no suggestion as to whether the thing made or produced was made or produced out of the author's own materials or out of materials provided by someone else. Now, the report of a speech, like everything else, must have an author, and if the reporter who produced the report is not its author, who is? But for him the report certainly would never

have come into existence. It may be said that but for the speaker of the speech also, the report of it would never have come into existence. This is quite true. In the same way, but for the City of London, Kelly's Directory would never have come into existence; but it would hardly be contended that the City of London was the author of Kelly's Directory. The existence of the thing described—in one case the speech and in the other the City of London—was a necessary condition to the making of the report or directory; but existence did not make it. Both are records of facts, and the person who records the facts (and not the facts themselves) is the author of the record.

These considerations are important in another connection. It is often said there is no copyright in ideas, there is no copyright in news, there is only copyright in literary form. I confess I never quite understood what was meant by these expressions. The phrase, literary form, does not occur from one end of the Copyright Act to the other. What that Act gives, as I have said, is the copyright in a document to the person who produces and publishes it. It does not give the copyright in the ideas contained in the document, or in the news, or, in other words, facts in the document—for news should be facts, although, judging by the news supplied lately from South Africa and China, it is rapidly becoming a new form of highly imaginative fiction—and neither does it give the copyright in the literary form of the document. It gives the copyright in the document itself. The producer of a document is entitled to the exclusive liberty of multiplying copies of the document, whatever its contents may be, and this liberty is infringed by anyone making what is literally or practically a copy of such document. Whether he takes the ideas, or the news, or the literary form is of no consequence—the real question is whether he has reproduced literally or substantially the document in which copyright

subsists. If he has—subject to the reservation that he has not done more than make a fair use of the document—he is guilty of piracy; if he has not, the author's exclusive liberty of multiplying copies has not been interfered with.

All these disputes as to whether or not copyright exists in this or that are due, in my opinion, in the first place, to confusion of thought between the existence of copyright and the proof that copyright has been infringed. If a subsequent writer takes facts or ideas from a published document, and disguises them by changing the language, it is usually very difficult to prove that he has done so; if he takes passages *verbatim et litteratim*, there is no such difficulty. But it does not follow that the literary form of the document is therefore the thing protected by the law and the substance of the document is not. The difficulty is not one of law but one of evidence. Once you can establish that the subsequent writer is appropriating the facts, or news, or ideas which you have collected or created, in such a way as to amount to the practical reproduction for his own benefit of your work, or of a substantial part of it, the Courts will grant an injunction just as certainly as if he had openly reproduced your words exactly as you wrote them. And they are due, I think, in the second place, to a misunderstanding of the nature of a copyright. Many authors seem to think that copyright gives them the right to prevent the reproduction of a single line of the copyright work; but it does nothing of the kind. It does not prevent what the Courts call a "fair use" of the copyright document. And what amounts to a fair use depends less on the extent to which the copyright matter is reproduced, than the motive of the person who reproduces it. If the Court comes to the conclusion that his motive is merely to appropriate dishonestly for his own benefit, the result of the author's labour, a very slight reproduction either of the words or

the substance of the copyright work will be sufficient to render him liable for piracy, whether that work is a book of poetry or a newspaper. (See per Chitty, J., in *Trade Auxiliary Co. v. Middlesbrough, etc., Association*, 40 Ch. D. 425.) If, on the other hand, the Court comes to the conclusion that the reproducer's motive was honestly to discuss or controvert or explain the workmanship of the author or the facts or ideas contained in his book, there seems to be hardly any limit to the right to reproduce. Lord Ellenborough, C. J., a century ago, expressed doubts whether the whole book might not be then literally reproduced (*Cary v. Kearsley*, 4 Esp. 169). And as public events are, of course, pre-eminently matter for discussion, the Courts would, no doubt, apply liberally the doctrine of fair use to the reproduction of news for the purpose of discussion in the public press.

The news reporter then is just as much entitled to copyright in his telegrams or correspondence as the reporter of a speech is to the copyright in his report of the speech, or as the leader writer in his leader, or as the novelist in his fiction. This will be seen to be of some importance in connection with another matter.

Another point should, I think, be referred to in this connection. Several of the judges in their judgments in *Waller v. Lanc* dwelt upon the skill and ability which a reporter must possess in order to report accurately—or rather to turn into respectable English as I should say—the speech of an ordinary speaker. There is no doubt about the necessity for such skill and ability in the case in question; but I think insistence upon it was unfortunate, as it is liable to mislead the reader. When the question is whether or not the document published is merely copied from another document, the point as to skill and ability is of importance; but where no such question arises, where there is no doubt but that the person claiming copyright is the pro-

ducer of the document in which copyright is claimed—as is the case in reporting a speech—it does not matter in the slightest degree whether much or little skill or ability is needed. The Copyright Act gives the copyright in a document to the person who produces it, whether ability or skill was necessary to produce it or not. As Lord Brampton, in his judgment in *Walter v. Lane*, says, in his incisive way: “If a person chooses (and many do) to compose and write a volume devoid of the faintest spark of literary or other merit, I see no legal reason why he should not, if he desires, become the first publisher of it and register his copyright, worthless and insignificant as it would be.” (*Walter v. Lane*, L. J. 69 Ch. 699, at p. 709.) This being so, I think it was unnecessary and even cruel of the learned judges to dwell so much upon the ghastly truth that it is owing too often to the skill and ability of the reporter that speeches are not merely made capable of being copied, and, therefore, the subject of copyright, but also made capable of being read.

*Prima facie* then the person who produces and publishes a document is entitled to the copyright therein. But there are two reservations upon this principle. The first is that he has no title to the copyright if the document is simply copied from another document produced by some other person or already published. This is what is meant by the phrase constantly recurring in judgments and text books, and constantly misunderstood by the public and even by lawyers, that a document in order to be entitled to copyright must be an original composition. All that is here meant is that it must be an original document, not merely a copy of a document. It does not mean that it must be original in thought and expression; it merely means that it must not be merely a reproduction of a document produced by someone else, or already published. This point is important, since in the case of *Walter v. Lane* the Court of



Appeal was itself misled into thinking that by "original" was meant that the contents of the document must be evolved some way or other out of the mind or imagination of the person claiming copyright in it—a view of the law which, if rigidly and consistently enforced, would, I venture to think, deprive nowadays nearly every author (except, perhaps, the Cape Town and Shanghai special correspondent) of all claim to copyright in his works.

It is to be noted that to prevent copyright arising it is necessary that the document should be actually copied from the other document—not merely that it should be identical with it. One document may be perfectly identical with another and still be an original. For instance, if a speaker does—as I am informed on credible authority some speakers do—commit his speech to writing and afterwards commit it to heart, then, if he has a sufficiently good memory and if his reporter is a sufficiently good stenographer, it is certain that the reporter's report and the speaker's manuscript will be identical; but that will not prevent the reporter having the copyright in his report, because his report is not copied from the speaker's manuscript—it is his own production. If, however, as sometimes happens, the speaker handed his manuscript to the reporter, who merely made a copy of it, the Court could not, in my opinion, hold the reporter to be the "author" of the report of the speech. His report would not be an original document, but merely a copy of one already existing. At the same time, I am not by any means sure that the reporter might not make title to the copyright in such a case as the assign of the speaker, who in this case would be the author of the speech and also of the report of it.

The second limitation of the right of the producer of a published document to the copyright in it, is that the publication itself must not be an illegal act. The publication may be an illegal act owing to the nature of the contents

of the document. If the contents are blasphemous, indecent, or seditious, the publication of the document is contrary to law, and no copyright can arise in it. But the publication may also be an illegal act owing to its being a breach of an express or implied contract between the person publishing and some one else. This covers the case so often put, in the correspondence over the judgment in *Walter v. Lanc*, of an amanuensis publishing books dictated to him by his employer. As I have already pointed out in such cases, the property in the book remains in the employer, and if the amanuensis publishes the book he acquires no more right to the copyright in it than any other thief does to property stolen by him. Not only so, but this limitation on the right of the producer of a document to the copyright in it, enables, as I have already indicated, a speaker to retain the exclusive copyright in his own speeches. If a speaker, before making his speech, announces that he declines to allow it to be reported, then anyone who reports it is guilty of a breach of faith, and the speaker could obtain an injunction to restrain him from publishing his report. It is not even necessary to make an express announcement to this effect: if the circumstances are such as to show that the speaker intended what is called only a limited publication of his words, the law will imply a contract between him and his hearers that the latter will not republish what he says. For example, a student has no right to print and publish his notes of a professor's lectures. He is entitled to take as full notes as he pleases of what the professor says, and to make any fair use of these notes he likes; but he has no right to appropriate the substance of the lectures for his own benefit by publishing them to the whole world (*Caird v. Sime*, 12 App. Ca. 326). When this is considered I think that the supposed grievance of speakers in not having the exclusive copyright in their own speeches

assumes a very attenuated form. The reason they have no such exclusive copyright is solely and simply because they deliberately abandon it. As a matter of fact, speaking from my own experience, the grievance of most speakers is not that they have not the exclusive right of reporting their speeches, but that the newspapers will not take the trouble to report them.

Assuming then the existence of copyright in reports of news or speeches, a question of great importance to journalists, and of great difficulty to lawyers, arises. It is this: Where the newspaper proprietor pays the reporter to report news or speeches, does the copyright belong to the reporter or to the newspaper proprietor? There are no decisions, as far as I am aware, to guide us in this matter. In *Walter v. Lanc* it is assumed throughout that the copyright is in the reporter, but the proprietors of *The Times* prevented any question on this point arising by getting an assignment of the copyright from the reporters before going into Court. We are, therefore, left to decide the point for ourselves on the general law, and more particularly on the law of master and servant.

Giving my own opinion for what it is worth, I think there can be no question as to the outside reporter. The London correspondent or the local correspondent who sends letters—whether these are composed of news or reports of speeches, does not, as I have already pointed out, matter in the slightest—is, in the absence of an express agreement to the contrary, within the protection of section 18 of the Copyright Act. In other words, the newspaper proprietor who publishes his correspondence, has no other right to it than the right to publish it in his paper. The reporter can prevent his publishing it in any other way—as for instance in a weekly edition of his paper—and he can prevent any other newspaper from publishing it at all. He is a contributor to a periodical, and in the absence of

an express agreement to the contrary, section 18 of the Copyright Act preserves to him the copyright in his work, subject to the newspaper proprietor's right to publish it in his newspaper.

The position, however, of the staff or inside reporter seems to me to be altogether different. He is the paid servant of the newspaper proprietor, just as the book-keeper of a merchant is the paid servant of his employer, and therefore I am inclined to think that his reports, whether of speeches or of news, are the property of the master. I cannot see how the reporter can be brought within section 18 of the Copyright Act. He is not a person retained and paid to contribute articles or other matter to the newspaper. He is a person employed to do certain work which the proprietor, acting through the editor, can use or not, as he thinks proper. He is, it appears to me, much in the same position as a secretary or amanuensis. He does whatever work he is told to do, and the result of his work is the property of his employer. The question, however, has never, as I have said, been before the Court, so far as I am aware, and accordingly I give my opinion merely for what it is worth, and with many misgivings.

Taking this to be the true legal position of the reporter of speeches or news—and I venture to think that the Courts will not hold it to be worse, though they may hold it to be better—it is clear that the journalist has often a valuable interest in his work, even after it has been paid for by the newspaper proprietor and published in his newspaper. But what remedy has he for the piracy of his work? I have no hesitation in saying that under the law as it now stands the journalist has no real remedy whatever. A remedy exists, but its expense and delay are such as to make it useless to the poor reporter, who cannot recklessly incur the cost of an action which may in the result go against him, or even

when the decision is in his favour, may leave him to pay his own costs. If the working journalist is to be protected he must have what we lawyers call a summary remedy. That, we have already pointed out in the book to which I have already referred. There, at page 119, we say: "There is a considerable class of writers who supply short articles, or sketches, or paragraphs of news to the newspapers in manifold copies, each paper making use of one of these having, according to the contract, a limited right of publication for a certain price named, the author reserving to himself the copyright. When other papers, as sometimes happens, instead of accepting such literary matter from the author and paying him for it, simply pirate it from some paper in which it has already appeared, the writer finds himself practically helpless. He cannot sue in the local County Court for the price of the article; and to suggest that he shall commence an action in the Chancery Division for infringement of copyright in the case of a scrap of matter valued at only a few shillings, is an absurdity. The only practical remedy would be a provision similar to that in Bulwer Lytton's Act for the protection of dramatic property (which was by the Act of 1842, extended to musical property) by which, in case of infringement, the offender can be proceeded against summarily in any court having jurisdiction in such cases, for the recovery of a penalty of not less than forty shillings, or damages to the full amount of the benefit to the defendant, or of the injury or loss to the plaintiff, whichever shall be the greater, together with double costs of the suit."

The remedy here recommended has been adopted in the Copyright Bill which has been again and again before a select committee, and may perhaps some day become an Act of Parliament—the most unlikely things in the world do sometimes happen. Clause 12 of that Bill provides a summary remedy by penalty for republishing without the

owner's consent news obtained specially and independently of a fact or event which has taken place beyond the limits of the United Kingdom. I have already, in a communication to your Council, which has been published in your proceedings, pointed out how this provision is based on a complete misunderstanding of the Colonial enactments which it is intended to follow. I will not repeat those criticisms. I will merely refer to two points. The provision is in the first place founded, as the prefatory memorandum to the bill shews, on the assumption that under the present law there is no copyright in news apart from its literary form. That, as I have already pointed out, is a complete mistake. But assuming that its object and effect is to prevent absolutely the reproduction of news, either for the purpose of discussion or any other purpose, it, in the second place, gives the summary remedy for this right only to the proprietors of newspapers and magazines. This, I venture to say, is giving help precisely where it is little needed, and refusing help where help is necessary to protect a man's honest work. The newspaper proprietor and the news agency are, without the aid of a summary remedy, perfectly able to protect themselves, as the various cases *The Times* has, for the benefit of all journalists, fought out, well shew. The person who now suffers, and who, however you extend his property in his work, will continue to suffer, is the poor country reporter or the young man who makes a humble living by his letters from London to country papers. To pass an enactment to help the wealthy man who needs no help, while leaving the poor man unprotected, is a complete travesty of reform. If the summary remedy is to be of any practical use, it must be extended beyond the proprietors of newspapers and magazines to the outside news reporter and local correspondent.

Finally, I would desire to say one word on this provision from a point equally important to newspaper proprietors

and newspaper writers. Most of the enactments passed nominally to protect or benefit the press have turned out to be entirely to its detriment. This is conspicuously the case in the matter of libel. If this Copyright Bill is passed I am not sure that the same thing may not occur again. The news reporter has now, undoubtedly, the copyright in his work, both in its form and in its substance for the same period that other authors have it. It is not at all clear to me that this provision of the Copyright Bill, whatever it is intended to do may not reduce that copyright, both in the form and in the substance of his work, from a period of forty-two years to a period of eighteen hours.

J. ANDREW STRAHAN.

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## V.—INDIAN JUDICIAL ADMINISTRATION.

OUR new Judge-Advocate-General, Sir John Scott, K.C.M.G., D.C.L., was, during many years, at the head of the Judicial Administration in Egypt, being also the British Member of the Mixed Tribunal. Afterwards he was a Judge of the High Court, Bombay. Hence, in addition to previous practice at the English Bar, he has had experience of divers legal systems and very different modes of judicial procedure. One considerable portion of what he has gleaned in these varied fields of judicial administration was embodied, some little time back, in a paper entitled "English and Anglo-Indian Criminal Procedure ; a Comparison," read before the Indian Section of the Society of Arts; and his broad and suggestive treatment of the subject was such as to afford, in the instructive debate that followed, ready openings for still wider survey of the practical aspects of Comparative Law and Procedure.

Mention of the names of some of the eminent jurists who contributed to that discussion may suffice to indicate that

the ground travelled over was much wider than that of criminal jurisprudence or Common Law. Indeed, some of the speakers, Sir Courtenay Ilbert, for instance, were anxious to explain that their knowledge of criminal law courts was very limited; but this disavowal left them all the more free to resume the perennial debate on Codification, its advantages and limitations. That speaker, after referring to Sir James Stephen's great draft code, which, though it did get before the House of Commons, had to be withdrawn, went on to remind his well-informed audience that scarcely any English-speaking community has codified its Civil Law; though he also admitted that Canada led the way in codifying its Criminal Law, and that a penal code, prepared long since for Jamaica, has been adapted for two or three other Crown Colonies. His only general criticism on Sir John Scott's paper was to the effect that some proposals therein for reform of English procedure had "too much Oriental flavour for his taste"—albeit we may recall that Sir Courtenay had his own turn in modifying or mending the Indian codes. Sir Frederick Pollock's review of the whole subject was replete with considerations looking before and after, which abounded with instruction. He made a peculiarly interesting diversion in showing that the Scottish system of criminal procedure has been "far too much neglected by students of Comparative Law"; and herein it may be remarked that Sir John Scott's vindication of the Indian procedure affords an effective comparison adverse to English criminal procedure, which, as he said, "remains a body of uncoded law to be found only in many books and decisions."

Before going further with our notes on this comprehensive survey, it should be mentioned that the debate was opened by the Chairman for the occasion, Sir Francis Jeune. After expressing his high appreciation of Sir John Scott's varied qualifications for dealing with the subject,



he glanced at French legal methods; then he commended the Indian procedure in so far that it had got rid of Grand Juries, as to which much venerated institution the President implied that the Judicial Committee of the Privy Council no longer regards it as "an essential feature of English procedure." As to the general principle of codification, Sir Francis frankly confessed "to being somewhat of two minds on the subject." This was aptly illustrated by his humorous account of how even the successfully introduced Canadian codes have been overcome, more especially in Lower Canada, by the tenacity of forensic practice; so that, as he said, "the English system [reliance on precedent and decisions] by its inherent force has defeated the system intended to supplement it." Yet, speaking as from his other mind, this widely experienced and practical lawyer admitted that it is possible and desirable to codify certain branches of our Civil Law. As one of these he instanced that of Bills of Exchange; which, though complicated by sometimes contradictory decisions, he considers ought now to be brought within "the definite and simple provisions of a code." He was also clearly of opinion that our Criminal Law should be codified, inasmuch as it is "far simpler and ought to be less complex than Civil Law either is or can be." And he was decidedly with Sir John Scott in thinking that "we might at any time learn from India [after alluding to its history from Lord Macaulay forward] that our criminal system might be made more simple, and that we might have a clear and definite code." The learned President remarked with regret, that of late years "zeal for legal reform has died away." But the difficulty of legislating on the subject he admitted was greater than ever.

The only native Indian lawyer who took part in the debate was Mr. Taleyarkhan, to whose concise and pertinent remarks on the occasion a certain melancholy interest

attaches, in that three weeks later he perished in the Great Western Railway collision at Slough. Mr. Taleyarkhan, as a legal practitioner of long experience in the use of the Indian codes, expressed his feeling of surprise that the administration of law proceeds so smoothly here without those aids and safeguards. He was good enough to attribute the easy working of our procedure and its readily accepted results, to "the great ability and learning of the Judges and the Bar, and to the orderly habits of the people." He considered that especially as regards criminal law, "codes in India are an absolute necessity, because more than half the magistrates are not trained lawyers." He endorsed Sir John Scott's opinion that the people of India "regard the High Court with almost superstitious veneration,"—partly, as he indicated, because under the code, those tribunals have power "to revise every order and sentence passed by any magistrate." Sir John Scott had quoted the testimony of the late Mun Mohun Ghose (an eminent practitioner on the Bengal side) in his well considered statement in 1895 that "justice was never better administered, and life and property were never more secure in the history of India than they are at the present moment. Even the masses and the people in Bengal have learnt to appreciate the blessings of a pure administration of justice." Mr. Taleyarkhan fully endorsed this, and, speaking himself from his knowledge of western India, said, "there never was a time . . . when justice was so well administered in India. They are dissatisfied with other matters, with (some) executive proceedings; but so far as the Judiciary are concerned they are absolutely satisfied . . . that this is one of the greatest claims of England to the gratitude of India."

Following the discussion several valuable contributions were sent in, chiefly from Indian Civilians; and on these,

two or three disputatious topics of current interest arose—such as the separation of Executive and Judicial functions; and trial by jury.

Two of these special notes—one by a Bombay Civilian, the Hon. Herbert Birdwood, long-time Judge of the High Court, the other by Sir C. Cecil Stevens, a member of the Bengal Civil Service, who, though not professionally a lawyer, has been a legislator and reviser, if not maker, of codes—are partly in the way of revising certain statements of facts in the paper, and more so by way of completing Sir John Scott's estimate of the practical side of his subject. Mr. Birdwood, "speaking from an acquaintance with the Indian judicial system reaching back to 1859," when the first Civil Procedure Code became law—supplied certain essential links in the evolution of British Indian law and procedure up to the present time, including notice of Sir James Stephen's influence thereon. As to the jury system, he revised Sir John Scott's rather restricted statement, pointing out that jury trials obtain in six of the chief provincial centres in the Bombay Presidency, in at least three of which he says "it has worked quite satisfactorily."

Here by way of striking and instructive contrast—though diverging from the sequence of the discussion—it is well to refer to the very different estimate of the jury system expressed by Mr. Durant Beighton, a Bengal Civilian who claims to have had large judicial experience in District administration. He also ventures to correct, as matter of fact, Sir John Scott's restricted estimate of the prevalence of jury trials—that is speaking wholly for Bengal. He points out that the code of 1861 contains a permissive section enabling any governor or chief executive authority to direct that cases usually tried by the Court of Sessions shall be assisted by a jury, and this ordinance has operated in seven of the Bengal districts. Mr. Beighton considers that this method has "worked very badly," chiefly in murder cases

and those of culpable homicide. He does not omit to mention that in the frequent failures of justice in these cases, the revisory powers of the High Court are brought into action on the motion of any Sessions Judge who may consider a jury's verdict to be flagrantly at variance with the evidence. He also remarked on the paucity of persons in those districts suitable to form an impartial jury, and he alluded to the liability of jurors to be influenced by motives of caste and by wealthy suitors.

Mr. Birdwood's clear explanation of the extent to which the union of Executive and Judicial, or rather Magisterial procedure now obtains—"such a combination of functions as would be regarded as anomalous in England,"—is of practical value just now that the whole subject is under consideration by the Indian Government, pursuant to the recent reference by the Secretary of State. He also vindicates the appellate system, and the wholesome exercise of revision by the High Courts.

The contribution by Sir Cecil Stevens, who spoke from thirty-six years' continuous experience in eastern India, also as the most active member of the Select Committee that brought the Criminal Procedure Code into its present form, presented a review of especial value and pertinence. He considers that the advantages of codification "were stated too broadly in the paper," and that "the President's observations on limitations are very important." Then he remarked with decision that any suggestion to codify "the substantive civil law in India may be cast aside at once as wholly impracticable" chiefly because "Mahomedan law could not blend with Hindu law; neither would give way to the other, and no compromise is possible." On the other hand, as compared with our regime of text-books, cases, and compilations relating to criminal law and procedure, Sir Cecil Stevens considers that "the Indian codes have the advantage of being compact,

intelligible, certain and authoritative ; besides being cheap and very easily procurable." It must be admitted that this practical comparison goes far ; for, as Sir Cecil testified, "an ordinary Indian gentleman is far better acquainted with both codes than most educated Englishmen are with the Criminal Law of their country." And it occurs to us to remark, that we are bound to include in this category our Great Unpaid.

It should be noted that Sir Cecil reminds us that the system of "village magistrates in the Bombay Presidency, mentioned by Sir John Scott, does not exist in Bengal—except that in Calcutta there are upwards of eighty unpaid Presidency Magistrates and a few Justices of the Peace," though all the more serious cases are taken by salaried magistrates, either barristers or Civilians.

Turning to the vein of current controversy that cropped up, now and again, in this discussion, though not directly connected with it, that is, on the conjunction of Executive and Judicial functions in the same person, it is convenient to begin with such a moderate and impartial witness as Sir Cecil Stevens. In his opinion "the balance of argument as to the separation of the judicial from the executive functions of the District Magistrates . . . is a change—at least under present conditions." In adducing certain practical and plausible grounds for this opinion—the chief of which are extra cost and extent of areas—Sir Cecil gives us some insight into the administrative circumstances of the Indian "Mofussil," which remarks may be helpful when reports on this subject are received from the Indian Government. He was not willing to admit that the separation of the two functions on that wide, remote, and secluded region can be accepted even as "a counsel of perfection." His more definite objection to the change is, that supervising powers of "the High Court provide an effective remedy" for occasional indiscretions,

or even scandals that arise under the present system of Collector-Magistrates; though, as our readers are aware, these powerful local magnates sometimes use their personal influence in course of trials, and occasionally let Sessions Judges know what they think as to the line that decisions should take.

Here it may be well to recall that the objections to the proposed change as stated by the Hon. Mr. Birdwood, though expressed with more of the lawyer's precision, are very similar to those maintained by the Bengal Civilian. But it must be noted that on the Bombay side the judicial and revenue (executive) branches of the service have long been separate to a large extent. Hence the Bombay men are apt to regard too lightly the need for this long desired reform in Indian administration. Thus Sir William Lee-Warner (formerly a Bombay Civilian, now occupying a high position at the India Office), after acknowledging that "the broad principle of a thorough separation of judicial from executive action is sound," and stating that "the victory of the separatists has long been won," asserts that "only one very small residuum of a great principle is at stake." He proceeded to magnify the supposed cost of the change, and make the most of "the loss of prestige" objection. Sir William, who, by the way, had no judicial experience, ignores the mischief frequently arising in other provinces of India from the incongruous union of these two functions in one officer, or the friction and obstruction caused in the administration of justice by interference with the provincial Judiciary. Hence the passing reference was scarcely intelligible, which he made to what is known as "The Chupra Case" one that had already been dealt with in a condemnatory Minute by the Government of India.

In conclusion it may be pointed out that the foregoing are only a few details, though important ones, amongst many

that were reviewed in course of the wide and discriminating survey of Indian judicial administration in the discussion evoked by the reading of Sir John Scott's crisply written, and comprehensive paper.

W. MARTIN WOOD.

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## VI.—THE INTERPRETATION OF TREATIES.

THE interpretation of treaties is one of those questions which have been brought into sudden prominence by the dispute between this country and the late South African Republic which led to the war now practically concluded. For that war we had political, besides legal, justification which warranted us in making representations, and in enforcing them when they were disregarded. Such considerations, however, transcend the sphere of international law, which recognises and always has recognised that it is not the sole measure of conduct between nations; they belong to the diplomatist and the politician rather than to the lawyer. Our case then (fortunately, some will say) does not rest on the legal question alone. Yet the differences to which the wording of the London Convention have given rise furnish a forcible proof of the need there is for generally recognised principles of interpretation. It may safely be said that more wars have been caused, or justified, by disputes as to the construction of international compacts than by any other cause or pretext. Some would have us believe that the evil is without a remedy. Sedgwick, for instance, states that it is as useless to frame fixed rules of interpretation as to endeavour to define the mode by which the mind shall draw conclusions from evidence. This may be an argument against subtle and elaborate formulæ for solving any and every case that may present itself, but it

does not disprove the value of establishing a consensus of opinion on the means that may and should properly be applied, in order to obtain a plain and definite sense from an ambiguous or uncertain stipulation.

Words are a means, and an imperfect means, of conveying intention. If treaties are to have any force and stability, it is imperative that the party promising and the party to whom a promise is made should know that their words will in the future be mutually construed in general accordance with a certain fixed system of interpretation; otherwise they cannot tell into what stipulations they are entering, it being impossible for them to foresee and provide in writing for every particular combination of circumstances that may arise. And, if this is the case with honest States, entering into a *boni fide* contract, the difficulty and the danger to the public peace must be infinitely increased when we have to deal with a dishonest party who purposely introduces words of a doubtful meaning, that they may hereafter furnish him with a handle for oppression, or a loophole for evasion. It has been said, and I think justly, that, *ipso facto*, by entering into a compact, States acquire a mutual right to have a fair and usual interpretation put upon its terms in the future. It is, moreover, essential that the rules of interpretation, whatever they are, should become matters of active common knowledge, and not be allowed to lie dormant in the public sub-consciousness, if an aggressor is to be effectually prevented from successfully cloaking his injustice in the pretext that his victim has committed an infraction of his engagements.

The necessity for some system of interpretation being recognised, the question arises, where and how can rules be found of such fairness and authority as readily to recommend themselves to all the members of the family of nations? Custom and usage are poor guides here, for,



unfortunately, it is just in the most important cases that we find law ousted by war and *inter arma silent leges*.

An obvious solution would be to adopt the rules which obtain for the construction of private instruments. And thus Kent: "Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to private contracts." There would be much to be said for such a proceeding, were it not that hardly any two nations have the same rules. The English law, for instance, as to the construction of written contracts, is that the document should be construed as a whole; and, unless it is obviously incomplete, must be taken to embody the whole intention of the parties. The court will not go behind the written word if it is clear, even though it be proved up to the hilt that the parties intended something different. In a recent case\* the Lord Chancellor said: "So far as I am aware, no principle has ever been more universally or vigorously insisted upon than that written instruments, if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself." He instances an old case where, under a demise of certain coal mines, the lessee covenanted to pay half the money that any coal therefrom obtained "should sell for at the pit's mouth." At the time when the contract was drawn, all the coal was sold at the pit's mouth; but afterwards a canal was made and an opportunity afforded of carrying the coal to a more distant market, where it was sold at an enhanced price. It was amply proved that circumstances showed what the real meaning of the parties was, namely, that the lessor should receive one-half of the price which the coal fetched in the market, and it was urged that the court would not tie down the parties to the mere words, but would look at the meaning. The court, however, rejected the evidence and held

\**North-Eastern Railway v. Lord Hastings*, A.C. (1900), at p. 263.

that the covenant, not being ambiguous in its terms, could not be explained in the way suggested.

The old Prussian Code\* says: "In deciding upon  
"dubious cases the judge is not allowed to substitute any  
"other meaning for the laws than that which clearly  
"appears from the words, their connection with reference  
"to the doubtful subject, or from the next and undoubted  
"reason of the law."

The French Code, again, provides†: "The common  
"intention of the contracting parties should be sought (in  
"contracts) rather than the taking of the literal meaning  
"of the words. Where a clause is susceptible of two  
"interpretations, it shall be construed in preference  
"according to the meaning which may produce some  
"effect, rather than that which would produce none. In  
"case of doubt, a contract shall be interpreted against the  
"party who has made the stipulations and in favour of him  
"who assumed the obligation."

Something, no doubt, can be effected towards arriving at principles acceptable to all, by a comparison of the laws of different nations on the subject. But at the same time it must not be forgotten that there is a wide difference between the subjects with which national and international law deal. The laws of evidence which municipal law has approved are largely compromises between justice and despatch. They are comparatively unobjectionable where private gains and losses are concerned. But where the interests, and sometimes the very existence, of whole States are at stake there is no place for considerations of mere convenience. A country cannot afford to allow matters of vital moment to itself to hang upon a word or a letter; frequently it must feel itself morally justified rather in repudiating a whole treaty than in fulfilling onerous

\* Introduction, sec. 46.

† Sec. 1156 seq.

obligations which it never had in contemplation. Even the Roman jurists, with their vague ideas of international law, recognised the impossibility of applying to the *bonæ fidei* conventions of nations the narrow rules of the civil law for the interpretation of contracts.

There remain the jurists, and in effect the old jurists only, for the conceptions of modern writers on international law are too divergent to allow of anyone reconciling their views and moulding them into a harmonious whole. Some like Calvo, Despagnet, Bluntschli and Heffter content themselves with a few sweeping generalities. Others, like Phillimore, go into great detail and draw distinctions of arbitrary refinement; whilst Lieber \* indulges in metaphysical gymnastics that are more calculated to bewilder than to instruct the reader.

Of the older jurists, those who have treated most fully of the subject are Grotius, † Vattel, and Rutherford. ‡ Vattel has closely followed in Grotius' footsteps, whilst Rutherford, though he accepts most of their principles, treats the subject in a somewhat broader and more general way. It may be of use to set out briefly a summary of the rules of interpretation on which these writers are, on the whole, agreed, and which, at the same time, commend themselves to the judgment by reason of their fairness.

The first canon, and one which is almost a truism, is that words must be taken in their plain and literal meaning. "It is not permissible," says Vattel, "to interpret what has no need of interpretation." But this is qualified by the reservation that the resulting sense must not be absurd or utterly unreasonable. Up to a certain point, therefore, when the plain meaning of a stipulation lies on its surface,

\* *Legal and Political Hermeneutics*.

† *De Jure Belli ac Pacis*, Book II., chap. xvi.

‡ Vattel, *Droit des Gens* chap. xvii., sec. 262-322, and chap. xviii., sec. 305. Rutherford has an interesting chapter on "The Interpretation of Treaties" in his *Institutes of Natural Law*.

there is an irrebuttable presumption, *juris et de jure*—to use Austin's nomenclature—that this is the sense intended. But beyond this point, where, though the terms used suggest a natural and obvious meaning, they can yet conceivably bear a narrower or a broader meaning, and, where it can be shown beyond reasonable doubt that to take the words in the first sense would be to defeat the avowed object of the treaty, it is permissible to construe them restrictively or extensively so as to fulfil the evident design of the compact. So far, it will be seen, we have no concern with the actual intention of the parties at the time of contracting. The words being plain, our criterion is simply this: How would a person, to whom the promise was made, reasonably understand them? Such a rule is essential in order that no place should be accorded to mental reservations. The jurists are rich in examples of chicanery and of evasions of the spirit by means of the letter. Grotius instances the quibble of Brasidas, who promised to depart from Boeotian territory and afterwards refused to leave it, denying that that could be Boeotian territory which he occupied with his army. "It is said," says Vattel, "that a man in England married three wives in order that he might not be subject to the penalty of the law, which forbids marrying two. This is, doubtless, a popular tale, invented with a view to ridicule the extreme circumspection of the English, who will not allow the smallest departure from the letter in the application of their law."

Many examples might be given, however, of attempts to explain away the clear provisions of a treaty by assigning motives which never existed. It is stipulated, let us say, that a fleet shall not be moved to a certain place. It may not be moved thither, even without hostile intent, for the compact may have had in view not merely a certain damage, but the possible danger which the presence of the

fleet might cause. During the American war, the State of Virginia passed a law under which those who owed sums to British creditors could obtain a valid discharge by paying the amount into the Loan Office. The treaty at the end of the war provided that "creditors of either side should meet with no lawful impediments for the recovery of their debts." It was held that by virtue of this treaty a British subject was entitled to recover his debt in spite of the previous law, since no mention of it was made in the treaty, and a good reason could not be shewn why the words should not be understood in their natural and obvious meaning\*.

On the other hand, it would be manifestly unreasonable for a State to demand help under the terms of an Alliance, where the nation to which it appeals needs at that moment all its forces for the defence of its own territories against an invading force. Again, it was provided by the treaty of Utrecht that the port of Dunkirk should be destroyed, the object of course being to prevent the French from commanding the mouth of the Thames with a port of naval equipment. Louis destroyed Dunkirk and then proceeded to build a larger port a couple of miles' off, at Mardick. Naturally enough we remonstrated, and in the treaty of 1777 it was in consequence stipulated that no new port should be formed within two leagues of Dunkirk or Mardick.

There are, however, cases on the border line. Thus Hall speaking of the Anglo-Dutch treaties of guarantee 1678-1748 says that the causes of a war are so complicated that a defensive alliance would be rendered nugatory if it were left dependent on the party whose help is invoked to decide whether the war to which he is called is a *just* war or not. But Vattel is of the opposite opinion.

Where the terms of a treaty are ambiguous, or where it

\* *Ware v. Hightor*, 3 Dallas (American) Reports 199.

is doubtful to what extent they were intended to apply, there are two means of arriving at a solution: either by artificial rules of construction or by evidence of the intention of the parties. Naturally the second of these two methods is the more satisfactory, if there are sufficient *data* to enable us to arrive at a tolerably certain conclusion, and in that event it will supersede the first. Amongst artificial rules may be classed the following: the meaning usually attached to words, in the special connection in which they are found, is to be observed. Where technical matters are dealt with, they must be construed according to their technical sense, account being taken of the state of scientific knowledge at the period when the treaty was concluded. Terms and provisions must be read by the light of the whole instrument; clauses, therefore, should (where possible) be so interpreted as to render each and every provision operative. When a word means one thing in one of the countries, and another in the other, the sense to be adopted is that which the word bears in the country bound by the particular stipulation\*. It is always to be presumed that a party grants no more than he expressly states, the onus of proving anything beyond that resting with the promisee. All these are mere *prima facie* rules, presumptions *juris*, for arriving at a conclusion as to which of the doubtful meanings to accept.

But, as we have said, all these modes of interpretation must give way to proof of the actual intention of the parties, though, in the case of ambiguities, we cannot demand that it shall be of so conclusive a nature as that which is required to rebut the very strong presumption raised by a plain and unambiguous term. The intention

\* By the treaty of Berlin part of Old Servia was annexed to the Principality of Servia. No mention was made as to the nationality of the inhabitants of the ceded part. M. Péritch, Professor of Law at Belgrade, considers that it should be decided according to Servian Law. *Vide: Revue Générale de Droit International Public*, March-April, 1900.

of the parties may be derived from antecedent or contemporaneous acts and circumstances, and, perhaps, even from subsequent events, but only if they are of such a nature as to cast light upon what the previous state of mind of the parties was. The *raison d'être* of the treaty, *i.e.*, the main intention of the parties in contracting at all, is often a good guide to their intention with regard to specific provisions. Here appears the usefulness of a preamble, which frequently enables later generations to judge of the motives which led up to the compact. But the fact must never be lost sight of, that such motives are seldom simple, but usually many and complex, and one side cannot be allowed arbitrarily to decide which of them was the dominant factor.

There is yet another source of conflict as to the meaning a treaty may bear. Circumstances may have changed since the time when the engagements were entered into, or events may take place of which the parties did not and could not have had cognizance. Here one test, and one alone, is applicable, namely, the consideration of what the parties would have arranged had they contracted with full knowledge of the new matter. This has been called an argument *e ratione legis amplius*. It is possible, too, that the new circumstances may be of such a nature that it is clear that if the parties had contemplated it, they would never have contracted at all, or have only concluded a resolute bargain, conditional on the event not taking place.

There is a school of writers who insist that every treaty contains an implied clause that it shall operate only while things remain as they are, or in Latin (for those who import fictions of this kind love to cloak them in the words of learning) *omnis conventio intelligitur rebus sic stantibus*. If the old maxim *pacta sunt servanda* is true, we should be driven to the inevitable conclusion that a treaty ceases to be operative half-an-hour after it is made. Grotius, speaking of this doctrine, says it can only be admitted where it is

quite clear that the state of existing circumstances was an essential part of the motive for the contract. Vattel warns us to be very moderate and cautious in its application, for it would be a shameful perversion of it to take advantage of every change that happens in the state of existing affairs in order to disengage ourselves from our promises; that state of things alone, in consideration of which the promise was made, is essential to the promise. Heffter, Hautefeuille and Fiore hold that a treaty may be disregarded when it interferes with the national welfare of the people, whilst Bluntschli goes to the length of declaring\* that: "Treaties of which the dispositions have come to be "in conflict with the necessary development of the constitution or private law of a State may be denounced by "that State." To Englishmen the doctrine in this extreme form need only be stated in its nakedness to be rejected by them; treaties would become so much waste paper. Its perniciousness is manifest when we consider that it would approve the action of Russia, for instance, in freeing herself, as she did in 1870, from the obnoxious provisions of the Treaty of Paris. The law of self-preservation is one thing, and the laws of interpretation are another. The former may at times supersede the latter; for, as we have said, it is the strength, and at the same time the weakness of international law that it recognises that it is not the sole rule of conduct between nations; but that is no reason why the two should be confused. As far as Law is concerned, a dispassionate view of all the circumstances that prompted a treaty can alone dictate when and how it can justly be modified, in view of what has transpired since its conclusion, and when it may be set aside altogether.

\* Sec. 458. Even if this statement be meant as a maxim concerning, not interpretation, but continuance of obligation, it appears to me to be far too sweeping.



Phillimore\* cites an interesting illustration from the case of the Russo-Dutch loan, which incidentally bears on another question : how far a treaty is voidable on the ground of a breach of some part of it. During the Revolutionary war, Great Britain took possession of the Dutch Colonies to save them from falling into the hands of the French. In 1814 she honourably restored them, retaining only the Cape of Good Hope, Demerara, Berbice and Essequibo; in consideration for which cession we agreed to pay a sum of six million pounds, three million of which was to be expended for the purpose of discharging certain pecuniary obligations of the Netherlands to Russia. The manner of payment was regulated by the Convention of May 19th 1815, between Great Britain, the King of the Netherlands and Russia. The preamble expressed that the arrangement was come to because His Majesty the King of the Netherlands was desirous "upon the final re-union of the Belgic provinces with Holland to render the allied Powers, who were parties to the treaties concluded at Chaumont on March 1st, 1814, a suitable return for the heavy expenses incurred by them in delivering the said territories from the power of the enemy." And it goes on to recite that the Powers had agreed to waive their claims in favour of Russia. By Article 5 it was provided that it should be understood that such payments should cease upon the Belgic provinces being severed from the Netherlands, but were not to cease merely in case of war.

In 1831, European affairs had undergone such a transformation, that, with our active support, Belgium was separated from Holland, and we then became, according to the letter of the treaty, absolved from further payments of the loan. But the true aim of that Convention, as was manifest from Lord Castlereagh's despatches to Lord Liverpool antecedent to its conclusion, was undoubtedly

\* Vol. II., chap. viii., sec. 64-95.

to make the policy of Russia the same as our own with regard to Holland and Belgium; and this object, it was thought in 1815, could best be secured by binding Russia with pecuniary penalties to uphold their union. In 1830 came the separation, but Russia was so averse to it that she had actually offered to send 60,000 men to prevent it. We were, therefore, bound in honour to continue the instalments, and a new Convention was accordingly concluded in November 1831. Its preamble states that "agreement "does not exist between the letter and spirit of the treaty "of 1815, but the objects of that treaty are to afford Great "Britain a guarantee that Russia would, on all questions "concerning Belgium, identify her policy with that which "the Court of St. James' had decreed the best adapted for "the maintenance of a just balance of power in Europe, "and, on the other hand, to secure to Russia the payment "of a portion of her old Dutch debt, in consideration of "the general arrangements of the Congress of Vienna, to "which she had given her adhesion—arrangements which "remain in full force. Their Majesties, being desirous "that this same principle should continue to govern their "relations with each other," stipulated that Great Britain should continue her payments, whilst Russia, on her side, bound herself to contract no new engagement with respect to Belgium without our previous consent. In 1847 the discreditable Convention was entered into between Russia, Prussia and Austria, by which the free city of Cracow was incorporated with the Austrian dominions, though it was part of the arrangements of the Congress of Vienna that its liberty should be sacredly preserved. A motion was brought forward in our House of Commons\* "that, Russia having withdrawn her adhesion to these arrangements, the payments from this country on account of the loan should be suspended." The Government, however,

\* *Hansard*, vol. xc., 879.

resisted the motion on the ground that the payments were made in consideration, amongst other things, of the cession of the Dutch colonies, of Russia's past exertions to keep Holland and Belgium united, and of her subsequent efforts to keep them separated. A similar motion\* made in 1854 met with like success; the provocation this time was that Russia had violated the Treaty of Vienna by neglecting the duty imposed upon her thereby of maintaining the necessary works on the Channel of the Danube at the mouth of the Sulina branch. There can be no doubt that in each case our Government acted rightly, for the observance of the arrangements of the Vienna Congress was only a subsidiary ground for the payment of the instalments.

Amongst the rules of interpretation given by the old jurists, there are one or two which I have purposely omitted, because they seem unsound or unnecessary. Such is the division made by Grotius and Puffendorf of promises, into favourable, odious and mixed. Favourable promises are stated to be those which give equality of advantage and mutual benefit: odious, those where the burden falls entirely on one side. The former are to be given a wide, the latter a narrow construction; mixed promises come in between. Barbeyrac rejects this classification, but Vattel adopts and extends it. Amongst odious things he classes whatever tends to change the present state of things; and amongst favourable things, whatever tends to preserve it. Hall retains a portion of this rule of construction, when he says that a treaty must be construed so as to give effect to the fundamental legal rights of States, and that whenever, or in so far as, a State does not contract itself out of its fundamental legal rights by express language, a treaty must be so construed so to give effect to those rights. So far as this doctrine has any meaning, it seems already contained

\* *Ibid*, August, 1854.

in the rule we have mentioned above, that he who promises must in the first instance be presumed to have given nothing more than that which he is expressly stated to give.

The jurists also state that the *effects* of a treaty may be used as a means of interpretation. Therefore, in the case of an ambiguity, if one construction would act more equitably than another it is to be adopted. But the value of such a rule is almost *nil*, for it is simply an argument from probability, and no great probability, since treaties are, as often as not, one-sided. A presumption is raised as to the state of the intention of the parties, which can at once be rebutted by proof that it was different. Moreover, there is a possibility which we must not leave out of sight: the effects of a treaty may be entirely different from what the parties intended. An example of this is furnished by Mr. Carman Randolph\*, in the case of Cuba. He points out that, from the Cuban standpoint, the island is in a singular position—severed from Spain—not joined to the United States—not the territory of a Cuban State; for, internationally speaking, there exists no State of Cuba. By the first article of the Treaty of Paris, Spain relinquished all claims of sovereignty and title to Cuba. And Congress does not wish, by legislating for it, to eat its own words of April 20th 1898, disclaiming any intention to exercise sovereignty, jurisdiction or control over the island. This curious state of things, we may be sure, was never intended, and it therefore follows that the effect of a treaty is a very unsafe guide to its interpretation. Mere equity and reasonableness of effect are in themselves no criterion, save in so far as they afford a means of arriving at the actual intention of the parties at the time they entered into the compact.

\* "Some Observations on the Status of Cuba" in the *Yale Law Journal* for June, 1900.

By the light of the principles we have adopted, let us now consider one or two recent cases where disputes have arisen as to the proper interpretation to be put upon treaties. It is only a year ago since the Newfoundland Fisheries Question,\* developing one of its chronic phases of acuteness, created considerable tension between ourselves and our Canadian colonists on the one hand, and France on the other. The history of the matter extends over two centuries, but its outlines are clear and may be briefly stated. The island of Newfoundland was discovered in 1496. British sailors were, at an early date, attracted thither by the rich cod fisheries, though it was not formally annexed to England till the year 1583. Fishermen of other nationalities, too, principally French, Spanish and Portuguese, flocked to its coasts; and, though subjected to considerable fishery duties, constantly increased in numbers. During the war of the Spanish succession, France obtained possession of the island; but, as the result of her final defeat, she was forced to restore it. However, as many of her subjects would have lost their means of livelihood had she relinquished all her rights there, the cession was made on the following terms (article 13 of the Treaty of Utrecht): "The island of Newfoundland, with the adjacent islands, shall henceforth belong absolutely to Great Britain, but so that neither His Most Christian Majesty, his heirs and successors, nor any of his subjects shall henceforth be able to make any claim at any time upon the said islands in whole or in part. Neither will they be permitted there to fortify any place or to establish any dwelling in any manner except stages made of boards, and huts usual and necessary for drying fish, nor to land on the said

\* The facts concerning this question are to be found in Prowse's *History of Newfoundland*, and articles in the *LAW MAGAZINE AND REVIEW* for November 1899; the *Revue des deux Mondes*, Feb. 1899; the *Revue Générale de Droit International Public* 1899, and an article in the *Nineteenth Century*, by Mr. P. T. Magrath, Editor of the *Evening Herald*, St. John's, Newfoundland.

“island at any other time than that proper for fishing and necessary for drying fish. In the said island the said subjects of France shall not be permitted to fish or dry fish in any part save from Cape Bonavista to the northernmost point of the island, and thence on the West as far as Point Riche.” These provisions were re-enacted in full by the Treaty of Paris 1763, which marked the conclusion of the Seven Years’ War. Along the French shore, as the part came to be called over which the French retained these rights, British and French continued to fish concurrently and with the amity that might be expected. The friction caused by the fisheries of the rival nationalities came to a head in 1782. In that year the French made a double proposal:—first, to shift the French shore further over to the West; and secondly, to make their rights exclusive instead of concurrent. The British Government was ready to concede the first point; but, in the face of public opinion in England, it felt that it could not consent to such an abandonment of British rights as was demanded by the second. The Treaty of Versailles accordingly provided that the eastern boundary of the French shore should be shifted North to Cape John, and the western boundary South to Cape Ray: and these remain its undisputed limits to the present day. By article 5 of the treaty it was provided that:—

“To prevent the disputes which have till the present occurred between the French and English nations,” their Majesties consented to the change of limits above mentioned.

“The French fishermen shall enjoy the fishing rights assigned them by the present article as they have had the right to enjoy that assigned them by the Treaty of Utrecht.”

That same day, however, George III. signed a secret declaration which was appended to the treaty. It is this declaration which is at the root of the whole dispute:—

"In order that the fishermen of the two nations may not give rise to daily disputes, His Britannic Majesty will take the most positive measures to prevent his subjects from disturbing in any manner by their competition the fishing of the French during the temporary exercise of it granted them on the coast of Newfoundland, and he will for this purpose cause the fixed settlements which shall be formed there to be removed. . . . Article 13 of the Treaty of Utrecht, and the method of fishing recognised from all time, shall be the model on which fishing shall be conducted, and which shall not be transgressed by either side, the French fishermen building nothing beyond their stagings and confining themselves to repairing their fishing buildings and not wintering, the subjects of His Britannic Majesty on their part in no way molesting the French fishermen during their fishery nor damaging their stagings in their absence."

An Act of Parliament was shortly afterwards passed giving the British authorities in Newfoundland power (backed by a penal sanction) to order all British subjects to remove their boats and establishments from the French shore. But the war of the Revolution upset all these arrangements, and we seized the opportunity to drive the French out and to re-establish ourselves, and up to the present day, in defiance of the French, a number of British colonists, cramped and heckled, still work their stations on the French shore. The Treaty of Paris 1814 restored matters, nominally at least, *in statu quo ante*, but with the difference that English fishery stations had again sprung up and were a *fait accompli*. We read of proclamations issued at different times in the twenties by the Governor of the Island, ordering the removal of all but French establishments from the French shore, but apparently they were not effective. Early in the next decade we find it enunciated for the first time that the French right is, after all,

only concurrent and not exclusive. The British Government twice submitted this question to the opinion of the law advisers of the Crown. In 1835 they returned an opinion in favour of the exclusive rights for which the French contended. In 1837 they modified it so far as to express the opinion that Great Britain could not justly be called upon to hinder her subjects from fishing on the French shore, providing there was really so much room that there was no danger of their coming into collision with the French—a proviso which clearly stultified the finding on principle. If, as a matter of fact, collisions had not been systematically occurring, there would have been no necessity to submit the matter at all to the opinion of these learned gentlemen. In 1837, 1857 and 1885 attempts were made by the two Governments to adjust their differences, but they proved abortive, largely owing to the obstinate determination of Newfoundland to relinquish none of its claims. The failure of the last attempt at conciliation only served further to embitter the feelings of the two countries. In 1887, in spite of the protests of the French Government, the Royal assent was given to an Act of the Colonial Legislature, known as the Bait Act, by which it was made illegal to sell bait (herring) to the French fishermen. This move was directed, not only at the French on the Treaty coast, but at the far more flourishing French fisheries off the great Banks. The French retaliated with interest. They proceeded to take herring themselves along their shore, and prohibited anyone else from so doing. As for the Great Banks, they discovered a bait that could be procured there, where, being on the high seas, they were safe from interference. To crown all, they started catching and canning lobsters on the Treaty coast, and even demanded of our Colonists the removal of their own lobster establishments there. Against the wish of Canada we agreed to a *modus vivendi*



on this point, which was put into force in 1890, its basis being the recognition of all the factories of both nationalities established before 1st July 1889. As regards herring, the French have for some time permitted the residents to catch these fish on condition that they sell to French fishermen all they want for not more than a dollar a barrel; French warships annually visit the bay to see to the enforcement of these conditions. Such are the facts of the matter. It need only be added that the French have incurred considerable odium by an oppressive enforcement of their rights along the Treaty coast; as in 1874, when they prevented the construction of a railway to terminate on the coast, on the ground that it would interfere with their fishery. Finally, in 1898 Mr. Chamberlain obtained the appointment of a Royal Commission of Enquiry to investigate the whole question. Its final report is not yet forthcoming.

It has been sought to prejudice the whole question by the statement that the French are pursuing a dog-in-the-manger policy. Along an extent of 300 miles of coast they have only some 600 of their subjects engaged on the fisheries during the season, and the average value of their annual cod and lobster take is only about 36,000 dollars for each industry. But we have already seen that the effects of a Treaty are not a fair guide to its interpretation. Whatever rights France has acquired by treaty are legally hers as part of a former consideration. Because those rights have grown to be less lucrative to her, are they therefore to be taken from her altogether? One would rather have thought that we could have found our opportunity here for purchasing them at a small sacrifice.

The points in dispute may be conveniently grouped under two heads :—

- (1) Are the French fishery rights exclusive or concurrent?

(2) Do they include the right, and whether or not the exclusive right :

(a) To catch herring for bait to be used

i. On the Treaty Shore.

ii. Off the Grand Banks ?

(b) To trap and can lobsters ?

With regard to the first point, it will be evident that everything depends upon the interpretation to be put upon the Treaty of 1783, together with the declaration with which it must be read as an integral whole. Now the body of the Treaty gives the French the same right of enjoyment as they possessed under the Treaty of Utrecht. The latter assured the full sovereignty of Newfoundland to England, *minus* certain definite rights which we lost *pro tanto* by granting to the French the privilege of fishing along a certain portion of the coast. Nothing is said, to imply that this privilege was to be exclusive. On the contrary, even if it had been, so many decades elapsed before any objection was raised to the right of the British to fish there though they had done so from the very year of the Treaty, that any such exclusive privilege must needs have been lost by prescription. But the unfortunate declaration goes further, and adds that the King of England will take the most positive measures to prevent "*que ses sujets ne troublent en aucune maniere par leur concurrence la pêche des Français.*" I give the words in the original, because Lord Salisbury uses "*interrupt*" in quoting, which is a word of much narrower meaning than "*troublent.*" The phrase is, I think, capable of expressing either of two meanings : "shall not compete so as to trouble," or "shall not compete and thereby trouble," *i.e.*, in effect, "shall not trouble even by competing," according as the emphasis is laid upon "*concurrence*" or "*troublent.*" If the former, and at first

sight, the more natural, interpretation is put upon the words, we are confronted with the difficulty that both the body of the Treaty and the declaration state that the arrangement is come to in order to put an end to the disputes which have been constantly going on. These could not but be increased if such a vague limitation as that of competition were meant to be adopted. It seems little short of absurd that the French should be safeguarded from mere competition and not be protected against the far more tangible molestation of having their source of supply drained to an unlimited extent by the fisheries of other nations on the coast. The alternative is to regard the express mention of competition as being intended to put the case at its highest, and, therefore, *a fortiori* to cover graver kinds of interference. This construction would accord with the passing of the Act of Parliament which we have mentioned, and with the fact that the Governor in 1822 states, in a proclamation forbidding all annoyance to the French fisheries, that "the right of fishing is reserved to the subjects of "His Most Christian Majesty in full and complete enjoyment." But the *ipsissima verba* of Mr. Algernon Fitzherbert (afterwards Lord St. Helens), who negotiated the Treaty, are even more convincing. "I ventured," he writes, "to propose as a *mezzo termine*, that the exclusive "right should not be mentioned in the Treaty, but that we "should promise *ministeriellement* to secure it to the "French fishermen by means of proper instructions to that "effect to the Government of Newfoundland. To this the "Count of Vergennes assented."

The whole transaction, says Mr. Prowse in his "History of Newfoundland," was dishonest. There was to be a sham treaty signed and set before the English House of Commons. The real treaty was to depend upon the word of the Ministry, and, afterwards, on the declaration of the King. But in the first place the treaty and the declara-

tion are not antagonistic, the latter goes further in regard to a certain matter than the former : it adds, but does not alter ; whilst the attempt to set it aside on the ground that it was "dishonest" is specious, but fallacious. The dishonesty was not between the contracting parties, *i.e.*, the King of Great Britain and the King of France, but between King George's Ministers and those to whom they are, by the English Constitution, morally responsible. Not even in the English law of contract does fraud or misrepresentation constitute a ground for rescission if it is directed against a person not a contracting party.

The second point turns on the meaning of *poisson* and *cod-fish* in the Treaty. The French would limit it to cod-fish. It has been stated that the word "cod-fish" appeared in the draft project of article 13, and it is suggested that the word was altered to "fish" out of mere euphemistic reasons. But this is a dangerous sort of argument, for it cuts both ways. That a certain word was different in an earlier document may prove, not that the meaning of the earlier was intended to be conveyed by the latter, but that the first was designedly corrected in the second. Cod-fish, moreover, though by far the most abundant fish off Newfoundland, is not and never was the only species, so that if we are to adopt the plain and not unreasonable sense of the word, "fish" must be taken to include every kind of fish, at the very least those (like herring) which were caught, even though only occasionally, at the time of the Treaty. It appears somewhat unjust to deny a herring the title of "fish," simply because it is liable to be used as bait. One might as well say that an ox is not an animal because it may one day become beef. It is equally difficult to grasp the contention that, at any rate, if your herring is to be used as bait elsewhere than on the French shore it cannot be included in the category of fish. Had cod-fish been the word used in the Treaty, it is conceivable

that the right of catching herring for bait might be argued to be implied by the Treaty ; for the concession would otherwise have been capable of being rendered nugatory, since it is as impossible to fish for cod without bait as to marry without a wife, and we have seen that it is a well-established principle of international law that each stipulation in a treaty should, if possible, be so construed as to be operative. In such a case it might well be urged that the inferred right of taking herring should be confined to its narrowest limits, and not be extended to a right to take them for use elsewhere. But, as it is, there is no room for these niceties of interpretation. If " fish " is to mean anything else than fish, the onus of proof is upon those who set up that allegation.

The lobster question presents many difficulties. Against the argument that lobsters are not fished for and dried, but trapped and canned, may be set the use of the expression " lobster fisheries." Of course, lobsters are *crustacea* and not *pisces*, but it must be remembered that we have to deal with the language and the zoology, not of to-day, but of some two centuries ago. It has been pointed out that such distinguished naturalists as Rondelet and Belon classed crustaceans amongst fish. But authorities have been quoted on the other side as well, so that it is clear that lobsters were not universally regarded as fish. Possibly those who signed the treaty went to their graves without having debated the point at all whether lobsters are fish or not. That they did not have them in view in concluding the Treaty is made probable from the fact that it was only after about a hundred and fifty years from the date of the Treaty of Utrecht that the Newfoundland waters came to be used for the taking of lobsters, and almost certain from the consideration that if they had intended them to be covered by " fish " they would have said so expressly, in face of the difference of ideas prevailing as to the relations

subsisting between fish and lobster. Until further light is thrown upon the state of mind of the parties, we must regard lobsters as a matter not provided for in the Treaty. The question we have then to answer comes to this: supposing the English and French, at the time they entered into their mutual obligations, had had lobster catching and trapping in view, what would they have contracted in that respect? I believe we can give a tolerably decisive answer to this question by answering another. Why did France obtain from England in 1713 that diminution of her sovereign territorial rights over the island which the granting of the French fishing privileges constituted? We have already touched on the answer—because she wished to protect the interests of some of her subjects whose means of livelihood lay in the fisheries, and who would otherwise have been rendered penniless. Now these men had been engaged on the cod-fisheries, not on lobster catching, and it thereby seems pretty certain that all the French were concerned with was the cod-fisheries and nothing else. If this reasoning be correct, it would result, not only that the French had no right to demand the removal of the native lobster establishments (provided their cod-fishing was not interfered with), but had no right to engage in that business themselves.

The dispute between ourselves and the United States of America as to the Alaskan boundary\* turns on the meaning to be given to a treaty, ambiguous by reason of the insufficient knowledge of its authors. The area in dispute is a long strip of coastline bordering on British Columbia,

\* *Vide: Alaska and the Klondike*, by Angelo Heilprin, London 1899; Blue Book, Treaty Series No. 19, 1899; Articles; in the *Fortnightly Review*, Sept. 1899; *North American Review*, Oct. 1899; *Edinburgh Review*, April 1900; *LAW MAGAZINE AND REVIEW*, Feb. 1900. Most interesting is the article by Mr. John W. Foster in the *National Geographic Magazine*, Nov. 1899. He is ex-Secretary of State of the U.S.A., and actually a member of the International Joint High Commission.

and forming a prolongation of Alaska proper to the South East. It is not, in spite of repeated asseverations to the contrary, in itself a rich country; no goldfields have been discovered there, nor indeed mineral wealth of any description. But it has suddenly acquired value and importance from the fact that it contains the only practicable access to the great gold-bearing districts of the Yukon, which are admittedly within Canadian territory. The United States title is derived by purchase, that country having bought Alaska from Russia in 1867 for some million and a half sterling, acquiring thereby Russia's rights in that territory, neither more nor less. It is, therefore, those rights that we shall have to examine. Russians appear to have discovered the country; in any case they were the first to settle there. In 1799 the Emperor Paul granted the Russo-American Company their charter, by which they were empowered to develop the country North of the 55th parallel of north latitude. In 1821 the Czar Alexander I. issued a ukase of mediæval extravagance, laying claim to exclusive jurisdiction over the high seas for a distance of 100 miles from the coast of Asia above 45 deg. 50 min. N. Lat., and for the like distance from the coast of North America above the 51st parallel. Along these coasts, landing and trading with the natives was prohibited to foreigners. In face of the vehement expostulations of Great Britain and the United States, Russia had to give way, to withdraw her pretensions to dominion over the Pacific, and to modify her territorial claims. Conventions were accordingly concluded between Russia and the United States in 1824, and between Russia and ourselves on Feb. 28th 1825. It is this latter compact around which the dispute centres, for the treaty of 1867 provided that the eastern limit of Alaska shall be the line established by the convention between Russia and Great Britain of Feb. 28, 1825." Articles 3 and 4 of the 1825 convention

are the all-important ones, and I give the official English translation, though it must be borne in mind that the signed original was in French only:—

“III.—The line of demarcation between the possessions of the High Contracting Parties upon the coast of the continent and the islands of America to the north and west shall be drawn in the following manner:—

“Commencing from the southernmost point of the island called Prince of Wales Island, which lies in the parallel of 54 degrees 40 minutes, north latitude, and between the 131st and 133rd degree of west longitude (meridian of Greenwich), the said line shall ascend to the north along the channel called Portland Channel as far as the point of the continent, where it strikes the 56th degree of north latitude. From this last-mentioned point the line of demarcation shall follow the summit of the mountains situated parallel to the coast as far as the point of intersection of the 141st degree of west longitude (of the same meridian); and finally from the said point of intersection, the said meridian line of the 141st degree in its prolongation as far as the Frozen Ocean shall form the limit between the Russian and British possessions on the continent of America to the north-west.

“IV.—With reference to the line of demarcation laid down in the preceding article, it is understood:—

“(1st.) That the island called Prince of Wales Island shall belong wholly to Russia.

“(2nd.) That whenever the summit of the mountains, which extend in a direction parallel to the coast from the 56th degree of north latitude to the point of intersection of the 141st degree of west longitude shall prove to be at the distance of more than ten marine leagues from the ocean, the limit between the British possessions and the line of coast, which is to belong to Russia as above-mentioned, shall be formed by a line parallel to the windings of the coast, and shall never exceed the distance of 10 marine leagues therefrom.”

The boundary is therefore (1) the Portland Channel; (2) alternatively the mountains nearest the sea or a line 30 sea miles therefrom, whichever is nearer to the coast; (3) from the 141st meridian, which is at or near Mount St. Elias, northwards on that meridian.

Until the discovery of gold in the Cassiar district, early in the seventies, the boundary was left defined no further than by the words of the Treaty. In view of the new importance given to South East Alaska by that event, Canada induced Great Britain, in 1872, to approach the United States on the question of the delimitation of the dividing line. But Congress refused to sanction the Bill introduced into the American legislature on the ground



that the £30,000 required was more urgently needed for other purposes. Further abortive negotiations took place in 1885, and it was not till 1892 that a joint Commission of Enquiry was appointed. The report which it presented dealt only with geographical details, the question of construction being left as it was. However, the line of the 41st degree, though not officially determined, is for all practical purposes agreed; for Canada and the United States each sent survey parties in the eighties for the purpose of defining it, and their results, arrived at independently, differed by only 200 yards. The International Commission of 1898 to 1899 effected nothing towards the solution of the difficulty.

\* The points of disagreement are three :—

- (1) What is the inlet referred to as the Portland Channel?
- (2) How are the "mountains situated parallel to the coast" to be determined?
- (3) What is the meaning of "a line parallel to the windings of the Coast"?

With regard to the first point, Canada contends that the Gulf known as the Portland Canal is the "Portland Channel" of the Treaty, whilst the United States contend that the line should enter the channel by an arm further to the south, named Observatory Inlet by Vancouver. The importance of this deviation is that it would give America control of the Canadian town of Port Simpson. And here it may be said that it is generally agreed that the framers of the treaty took their geography from Vancouver's charts; in fact, these charts remained practically unquestioned until the middle of this century. The United States refuse to accept the Portland Canal proper as the inlet where the line enters the mainland, on the ground that the words of the Treaty are: "A partir du point le plus méridional de l'île dite Prince of Wales,

"lequel point se trouve sous la parallèle du 54<sup>e</sup> degré 40  
 "minutes de latitude nord, et entre le 131<sup>e</sup> et le 133<sup>e</sup>  
 "degré de longitude ouest (méridien de Greenwich), la  
 "dite ligne remontera au nord le long de la passe dite  
 "Portland Channel, jusqu'au point de la terre ferme ou  
 "elle atteint le 56<sup>e</sup> degré de latitude nord." They argue  
 that there is a gap in the description of the line from Cape  
 Muzon (which is agreed to be the southernmost point of  
 Prince of Wales Island) to the point where it enters the  
 mainland, and that the line must, therefore, have been  
 meant to follow the latitude of 54 deg. 40 min. which is  
 expressly mentioned. This argument does not carry con-  
 viction, whilst, on the other side, Canada's attitude is  
 simply this: "The Treaty mentions the Portland Channel.  
 We have no concern with what Portland Channel may  
 mean to-day, but only with what it meant in 1825. Now  
 we are agreed that the negotiations of the Treaty were based  
 on Vancouver's maps, and his maps, as well as his descrip-  
 tions, make it abundantly clear that what he called the  
 Portland Canal is the northern arm, and up it we submit  
 the line should go." It is a pity that this firm ground  
 should have been weakened by a claim at one time set up  
 by the Canadian jingo press; that the Behm Canal, much  
 further north, was the channel intended. The reason was  
 advanced that the treaty speaks of the line ascending to  
 the North along the channel as far as the point of the main-  
 land, where it reaches the 56th degree N. latitude, and that  
 the Portland Channel does not strike the 56th degree at  
 all, because it never gets as far.\* But this makes "elle"  
 refer to "Channel," whereas it must refer to "ligne" or

\*From a glance at Vancouver's chart as reproduced in the *National Geographic Magazine* it at once appears (i) that Vancouver's 'Portland Canal' is the northern arm of the Portland Channel; (ii) that the Portland Canal does not reach 56° N. Lat., but ends some 15 minutes South of it. This gap in the description of the line ought, I would submit, to be filled in by a North and South line drawn from the 56th degree to the head of the Channel.

the insertion of "de la terre ferme" would be nonsense. How can a channel reach any place but one on the mainland?

The second and third points are harder to determine. We have to face the fact that Vancouver took his observations from the sea; seeing a fringe of mountains along the coast, he inserted in his charts a continuous and artistic chain of mountains all along. Unfortunately, this chain has no existence. The character of the whole region is rugged and mountainous, but whilst in one part the ranges run into one another with bewildering intricacy, in another we find flat and table land, broken only by a peak here and there. The United States' claim here is that, since there is no continuous range, the artificial boundary of ten leagues must be resorted to all through; whilst Canada asserts\* that the treaty does not make a point of the existence of a regular chain, but, from the fact that it contains an alternative system of delimitation, rather implies the opposite. She urges that the general trend of the ranges nearest the sea should be followed, lines being drawn from crest to crest. On this principle the American portion would be reduced to a strip averaging only five miles in breadth. Moreover, and this is the third point, the United States say that the ten-league boundary should be calculated from the edge of the coast which must be followed round the ten or twelve inlets with which it is indented, and not, as we say, drawn across them. The Lynn canal is the most important example, forming, as Mr. Horace Townsend says†, "the gateway to the gold-bearing Yukon district, including the Klondyke; the boundary, according to the United States contention, continues to the summit of the mountain range

\* The claim once put forward by Canadians that the coast should be measured from the outer shore of the islands fringing the mainland may be dismissed as obsolete and untenable.

† In the *Fortnightly Review* for Sept. 1899.

nearest the head of the canal, where are situated Dyea and Skagway, a distance of about eighteen to twenty miles inland; according to the British claim it would be but thirty miles from the mouth of the canal, thus leaving these two important settlements within Canadian territory." For the moment this question does not press for solution, since on the 20th October 1899, a *modus vivendi* was concluded, a provisional boundary being fixed which leaves the head of the Lynn Canal to the Americans. But sooner or later the whole matter will have to be settled, if the existing tension between Canada and her neighbour is to be relaxed.

(To be continued.)

## VII.—CURRENT NOTES ON INTERNATIONAL LAW.

### China.

The international position of affairs in China remains the same. Although fortunately the dreaded catastrophe to the diplomatic representatives in Peking was averted (it must be added by their own military resources), still the murder of the German Minister and the loss of other lives in the Legations constitute an offence against the law of nations which casts upon the Chinese Government a heavy responsibility. The European Powers, the United States and Japan have, however, so far—following the principle of Pacific Blockade—succeeded in avoiding the international difficulties arising out of a state of war with China by treating the whole affair as a domestic insurrection and using their own armed forces as police. This precludes them from holding the Sovereign Power in China personally responsible. It is to be hoped that when satisfaction has been made the various States concerned

will in joint conference determine their rights in China between themselves as well as between themselves and China. The commercial treaties are not reconcilable with the territorial arrangements made with some of the Powers, and it is desirable and necessary that foreign relations towards China shall be dealt with as a whole.

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### **South Africa.**

Now that the Boer States have been annexed, their former Executives have fled or dissolved, and their military forces no longer carry on a regular warfare, the war in South Africa may be regarded as practically closed. The contributions made by it to the store of international law and practice have not been considerable, perhaps the most important being the adoption, within certain limits, of the continuous voyage theory on the subject of contraband, as a rule of British prize law, and (indeed it now seems) of general application; and the attempted codification by the German Foreign Office of the law of visit and search. The range of international law applicable has been narrowed by the fact of the military operations being carried on in an inland state, although this very circumstance has lent particular importance to the neutral conduct of the only neutral conterminous state. The only questions which remain are those connected with the transformation of the Boer States into portions of the British dominions, and the recognition of this state of things by other States. When the proclamation of annexation has been notified to the previously neutral States, and it is in the judgment of their Governments justified by circumstances, it is their duty to recognise the existence of a new sovereign of the conquered States. A question has been raised in this connection as to the attitude which the courts of law in such countries will take up towards the State property of the former sovereigns of those States, which is situate within

their jurisdiction, if it is claimed by the new sovereign. According to general practice, the courts in such a case refer to the acts of their Governments for information on the point whether the former sovereign has ceased to be recognised as such—our own courts treat a certificate from the Foreign Office as conclusive of the position of an alleged sovereign—and decide accordingly.

### The Rouen Conference

Among the many meetings of lawyers and others which the Paris Exhibition has caused to be held in France this year, the conference of the International Law Association at Rouen in August and that of the Comité Maritime International at Paris in October, have produced discussions and expressions of opinion, and more or less progressive conclusions on subjects of International Law. The chief points dealt with at the former were (1) the consideration of the Hague Convention; (2) the unification of the law of marine insurance; (3) the execution of foreign judgments; (4) the immunity of private property at sea from capture during war.

As regards (1), the only suggestions made to the Conference related to the convention regarding the conduct of warfare on land, especially the occupation of territory by an invading force. The convention gives the rights of belligerents to the *terre en masse* only of the population of unoccupied territory provided that it respects the laws and usages of war, while in territory occupied by the enemy's forces acts of warfare constitute a form of treason punishable by death; but such occupation must be constant, actual, and effective; and the occupant has all powers of jurisdiction over the territory occupied, and the duty of taking such measures as are necessary to re-establish order, enforcing the existing laws unless circumstances absolutely forbid.

The conference adopted suggestions that the people of occupied territory shall be informed as publicly and widely as possible how far the occupation extends, and what are the consequent powers of the occupant (in accordance with a provision of the code adopted by the Institute of International Law at Oxford in 1880); and that the repayment of supplies, labour, or money furnished to an invader under the heads of contributions and requisitions shall be secured by making the receipts demandable, in all such cases a charge on the invading Government. Comprehensive as the Hague Convention on this subject is, it is clear that there is still room for amendment, and probably each war will contribute details to its system. It may be noticed here that the Convention forbids the practice of the Franco-German war 1870-1871 of fining districts on violence being offered within their limits to communications, or supplies, or small parties of soldiers. The system adopted by the British commanders in the late war of destroying property which had facilitated, or would facilitate the repetition of such acts, has the advantage of being a more direct and reasonable remedy.

As regards the International codification of the law of Marine Insurance—in which a good start was made last year at the Conference at Buffalo—by means of a code of rules intended to be incorporated by reference into policies similar to the York Antwerp Rules of General Average, there seemed good reason to hope that the Continental nations would concur in the recommendations of a Committee of American and English lawyers, underwriters, and shipowners, the chief of which were the adoption of the Continental standard in cases of constructive total loss (viz. three-quarters of the value); the change of the warranty of sea-worthiness into an engagement, the breach of which does not nullify the contract, but only frees

the insurer from loss caused thereby; and the retention of the Anglo-American law of double insurance under which all policies covering the same subject matter are equally liable, instead of the continental principle of looking to the first policy in order of date. An expression of Belgian opinion on the subject furnished by the Belgian Association for the unification of Maritime Law was not, however, quite in line with the Anglo-American suggestions and the further consideration of those proposals was postponed to the next conference. Undoubtedly in the near future uniformity should be reached on this subject, especially in view of the impetus lately given to general unification of maritime law by the action of the recently formed Continental Comité Maritime International; and there are signs that English lawyers are realising that in this department of maritime law as in that of limitation of shipowners' liability they will do well to approximate more nearly to the general line of the Continental systems.

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It seems difficult to make any step forward towards obtaining a general international agreement on the subject of the execution of foreign judgments; although this has been successfully secured in treaties between two nations, *e.g.*, France and Belgium in 1900, and a spirited attempt has been made (unsuccessfully) by a British colonial statute (Mauritius, 1899) to deal with it by municipal law. The difficulty lies in the different views which different countries take of what gives their courts jurisdiction in particular cases, and although for over twenty years the International Law Association has been considering this problem, it has not yet been able to solve it by formulating an acceptable code of rules. A draft convention though drawn only in general outline and draft rules of jurisdiction (*competence*) were not found capable of adoption by the conference, but were referred back for consideration by



representatives of the various countries represented. The view has been expressed by so eminent a continental student of this question as M. Lachau that the only method of overcoming the difficulty is for treaties to be made between one nation and another on this subject until in course of time all countries can thus gradually be brought into line ; but there should not be room for doubting that suggestions for general international adoption, with this object, are at least useful as indicating general uniform lines on which engagements between particular nations can be formed. .

### **Immunity of Private Property at Sea.**

This subject, of all those discussed at the above Conference, is that which is perhaps of the widest interest in public international law. At the Hague Conference it was brought up, but was ruled to be outside the scope of its functions. At Rouen, although the discussion did not end in any conclusion being adopted, the various views on the subject were fully presented and criticised. The American representatives, in accordance with tradition, advocated the adoption of the principle as a general rule of international law, preserving at the same time the belligerent rights of search, seizure of contraband, and blockade. The European members, on the whole, opposed making such a change in the existing law on the ground that it is a question of policy for each State, varying according to its geographical position ; the wish was even expressed that the Declaration of Paris should be renounced ; and it was pointed out that that Declaration does not historically represent a tendency in the direction of limiting the operations of war, and exempting the private property of the subjects of belligerent States at war from confiscation, nor was it intended as a step towards the doctrine that a citizen may

have the rights of peace while his country is at war. From the standpoint of policy, it has been urged, or admitted, by English writers (Westlake and Holland) that the adoption of the principle by England will be to her advantage, as securing the safety of her shipping in any event. Without attempting to discuss the subject here, it may be useful to recall that the principle has been applied as yet only by four States, Austria and Prussia in 1866, Prussia in 1870 until France began to act according to the established law, and the United States and Italy in 1871, none of these nations being what may be called maritime nations, drawing their support from or possessing ascendancy at sea. Moreover, the argument that because property on land is not subject to capture, therefore property at sea should not, can be much discounted by the fact that the former is not always exempt, but is liable to destruction or seizure if military necessities require it. Again, compensation may take the place of exemption, supplied by marine insurance, and this method is already available to British shipowners. It does, however, seem that the area of loss under the existing law is, or may be, out of all proportion to the necessities of the particular war, and whether this acts as a moral force to prevent nations plunging into war is not certain; and it is noticeable that Hall (*International Law*, 1895, p. 465) observes that "opinion in favour of the principle sought to be established is sensibly growing in volume and force, and that the larger number of well-known living foreign international lawyers undoubtedly hold that it ought to be accepted into international law."

G. G. PHILLIMORE.

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#### **The Comité Maritime International at Paris.**

The yearly meeting of this Society in the Salle des Congrès at the Paris Exhibition last month was fully attended by representatives of all, or almost all, the maritime nations

of the world. Lord Alverstone, president of the Maritime Law Committee of the International Law Association, represented Great Britain, together with some half-dozen other English members of the Association. The subjects discussed were (1) the steps that have been taken in England to give effect to the resolution passed in London last year upon the subject of limitation of shipowners' liability ; and (2) the unification of the laws of various countries relating to salvage.

As to the first matter, namely, the thorny question of shipowners' liability, no progress was made beyond the passing of a resolution, proposed by Lord Alverstone, that a small committee of the Society be appointed to formulate the laws which it is desirous of having passed for the purpose of making the liability of shipowners the same in all countries. This will be a very difficult task. It is much easier to pass a resolution in general terms than to put those terms into a working shape, which will be accepted by the legislatures of all the maritime nations of the world. As to England, the Act of Parliament passed last Session, by which shipowners' liability for damage done to objects ashore was limited, and more especially the manner of its passing, will not facilitate any measure which may hereafter be proposed in the English Parliament, having for its object the further limitation of the liability of shipowners. The price that was paid, as Lord Alverstone expressed it, for that Act, namely, the limitation of the liability of dockowners, did not escape the notice of the Lord Chancellor and other members of the House of Lords ; and the public, other than shipowners and dockowners, will have something to say when they fully realise the character of that Act, and of the legislation with which the Society and the shipowners desire to supplement it. Some speakers at the Congress endeavoured to represent England as the only nation that stands in the way of

progress towards uniformity of law on this point ; and her stupidity in resisting an alteration in her law by which her shipowners will be benefited, has been pointed out again and again. It must not be forgotten, however, that the interest that is most strongly, indeed, almost exclusively, represented at these meetings, is the interest, not of the public, but of the shipowners. But there are higher and greater interests involved in this question than those even of the shipowners. It is, nevertheless, the fact that, as things stand at present, the British shipowner has a real grievance. Nowhere in the world, we believe, can he recover a farthing in a foreign court, if the negligent ship that sinks his vessel is herself lost in the collision, whilst he is himself liable to be sued in the courts of his own country in a similar case, and, if the collision is proved to have been caused by the fault of his ship, judgment goes against him personally for damages.

Upon the other subject which was discussed at the Congress, there is little to be said. No such fundamental differences exist in the municipal laws of the nations of the world upon the subject of salvage as exist in those relating to collision. Several resolutions were passed, the object of which was to assimilate the various codes or systems of salvage law, and to eliminate differences. The broad principles of salvage law were laid down ; and where differences exist, the law of England was generally preferred. One rule of English statute law, namely, the enactment which raises a presumption of fault, in case of collision, against the ship that runs away and gives no assistance to the other, was not approved ; and, we think, the Congress was right in refusing to advise a general adoption of this arbitrary and uncertain rule. The first resolution upon the general subject of salvage was opposed by the representative of the United States. It was to the

effect that it was desirable to state, in terms, the general law of salvage, and to propose and recommend a code for adoption by all nations. The United States representative, Mr. Benedict, speaking on behalf of his colleagues of the Maritime Law Association of the United States, said upon this that they did not consider that it was advisable to formulate the law of salvage; that the general principles of salvage law were the same all the world over, and that to enact a law that all seamen should be humane and should assist each other would be futile. This, however, was not the opinion of the majority of the members of the Congress, who thought that something is gained by enunciating the law, even though its main outlines are already the same in most civilised countries.

At the close of the meeting an interesting speech was made by Professor Matsunami, a member of the Japanese branch of the Society. He called attention to the fact that in the case of a collision between a man-of-war and a merchantship the former has a right of action against the latter, whilst the merchant ship has, in no country in the world, a legal right to recover damages against the man-of-war. This, he urged, was an anomaly and an injustice; and he proposed that a right of action should be given to the merchant ship, or, in the alternative, that an international tribunal should be erected with power to adjudicate upon such cases and to give redress. The Professor, who has given much time and study to ascertain the law of England upon this subject, presented to the Congress a book (reference to which will be found in the Review section of this number, p. 114) in which he sets forth the law of England, and suggests amendments which appear to him to be desirable before it could be adopted as a model for other nations. This matter is obviously a very large, important, and delicate one, and the meeting decided that it was too large and too important to be properly dealt with at the close of

the three days that had already been devoted to the other subjects. It was decided that it should stand over to the next meeting of the Congress.

It has been sometimes suggested that the meetings of the Society are unpractical and lead to no definite result. Whether this is so or not, the British shipowner, who is by no means a visionary or unpractical person, is taking a very keen interest in them, and we are glad to see that this is so. If he cares more about his own interests than the unification of the law, that is only human nature; and his presence is a wholesome check upon airy eloquence and academic discursiveness into which these congresses have a tendency to degenerate. Lawyers and theorists, if left to themselves, might make uniformity of the law more remote than ever.

An interesting episode in the recent Congress was the reception at the Elysée of the members of the Congress by the President of the French Republic.

R. G. MARSDEN.

#### VIII.—NOTES ON RECENT CASES (ENGLISH).

The House of Lords have affirmed the judgment of the Court of Appeal in *New Sharlston Collieries Co. v. Earl of Westmoreland* (108 L.T. 538). It is well known that the rule of law in respect of mines is that where the property in the soil and in the minerals belongs to different persons, the mine owner must not work the mines so as to let down the surface, but this does not apply between a lessor and a lessee of mines. The rights of the parties under such a lease must depend on the terms of the con-

tract, and it was so decided in 1872, in *Eaden v. Jeffcock* (7 Exch. 379). It is, therefore, proper to make express provision for protection to the soil and buildings thereon when so intended. In the newly decided case the surface and minerals belonged to different owners, and the decision shows that the owner of the surface of land does not by parting with the minerals under such land lose his common law right of support; and in the absence of express power or necessary implication in the conveyance, the grantee of the minerals has no right to work them so as to let down the surface.

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A case interesting to those who live in flats came before the Chancery Division lately. The plaintiff was lessee of a flat at Grosvenor Mansions, and the defendant was the lessee of the 'basement' and *entresol* below the plaintiff's premises. The defendant had altered his premises, placing a large cooking range in the place of a small grate, which opened into a flue not large enough for the purpose. The result was an excessive and alarming amount of heat. The matter came before the Court as *Sanders-Clark v. The Grosvenor Mansions Co. Limited and D'Allesandri* (35 L. J. 363), the action having been discontinued as against the Grosvenor Mansions Company. The judge (Buckley, J.) found that the defendant was using the premises for purposes for which the building was not constructed, the alterations made by the defendant were not reasonable, and the defendant had used the premises for a purpose for which they were not intended. The defendant was held liable in respect of the ground of complaint, viz.—the heat. Had he used the premises reasonably there was nothing which at law could be considered a nuisance. In *Reinhardt v. Mentasi* (58, L.J. Ch. 787) KEKEWICH, J., held that an action would lie to restrain a nuisance whenever it could be shown that the plaintiff suffered material

injury from the act complained of, and that it would not be a sufficient defence to prove that the nuisance arose from the reasonable use by the defendant of his own property. The point is not an easy one. There are expressions in some judgments which point to stronger protection being given where the rights of property are invaded than where they are not; but on the other hand there are many cases in which a private nuisance, not affecting rights of property except so far as to prevent a man from personally using his own with reasonable comfort, may be regarded as having been equally condemned. The principle applied in either class of case is that a man must not use his own so as to injure his neighbour, and in substance the only question discussed in any given case is whether that principle is applicable to the particular circumstances then occurring. Perhaps the most eminent decision on this intricate subject is that of *Ball v. Ray* (L.R. 8 Chanc. App. 467) on appeal to the Lords Justices from the then Master of the Rolls (Lord Romilly) where the occupier of a house in London had many years before converted the ground floor into a stable. In 1871 a new occupier altered the stalls so that the noise of the horses was an annoyance to the next door neighbour and prevented him from letting his house as lodgings. In that case the Court (Lord Selborne, Lord Justice Mellish and Lord Justice James) held that the fact of the horses having been previously kept in the stable, but so as not to be an annoyance, did not deprive the neighbour of his right to have the nuisance restrained. Annoyance caused by the unusual use of a house may be a nuisance when like annoyance from the ordinary use of it would not be. In making out a case of nuisance of this character there are always two things to be considered, the right of the plaintiff and the right of the defendant. If houses adjoining each other are so built that from the commencement it is



manifest that each adjoining inhabitant was intended to enjoy his own property for the purpose for which it is constructed, then so long as the house is so used there is nothing that can be regarded in law as a nuisance. But if either party turns his house or any portion of it to an unusual purpose, in such a manner as to produce a substantial injury to his neighbour, this is not according to principle or authority reasonable use of his property, and his neighbour shewing substantial injury is entitled to protection.

*Shoolbred v. Roberts* (109 L.T. 224) is interesting to those who play billiards for high stakes. R. and D. two professional billiard players arranged a match for £100 a side, each party depositing £100 with stakeholders, the whole to be paid to the winner. R. was bankrupt, and still undischarged. R. won the match. The trustee in bankruptcy then gave notice to the stakeholders that he claimed the £200, and the bankrupt gave them notice that he claimed the money himself. The stakeholders took out an inter-pleader summons and paid the money into Court. The issue was tried before Phillimore J., who held that the plaintiff was entitled to the £100 which the bankrupt had deposited, but he refused to make any order as to the other £100. On appeal and cross-appeal the Court of Appeal (Smith, Williams, and Romer L.JJ.) decided that the plaintiff was entitled to the whole sum of £200. This decision appears to be based on sound reasoning, and it gives a judicial interpretation to the words in section 44 of the Bankruptcy Act, 1883, (46 and 47 Vict. c. 52) "all such property. . . as may devolve on him before his discharge."

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The Divisional Court (Grantham and Channell JJ.) decided an important point under the Merchandise Marks Act, 1887, in *Christie (apps.) v. Cooper (resp.)* (109 L.T. 204).

The King of Saxony is entered on the register of Trade Marks as proprietor of a certain trade mark in respect of china, porcelain, &c. The appellants exposed to public view at their auction rooms for sale certain goods, among others goods described as Dresden china in the catalogues, and they had affixed to them marks resembling the King's trade mark. On the morning of the sale the appellants received a telegram from the solicitors to the Royal Factory stating that they believed the above goods were not genuine. The appellants, on the lot being reached, stated the facts, and said that they sold the goods for what they were worth. On an information being laid against the appellants for having sold certain goods to which forged trade marks were applied, within the meaning of s. 2 of the Merchandise Marks Act, 1887, the magistrate convicted the appellants, holding that they had not proved that, having taken all reasonable precautions, they had no reason to suspect the genuineness of the trade mark, and that they had not "acted innocently" under subs. (c.) although they had not been guilty of any intention to mislead or to induce persons to purchase. It was submitted for the defence that the appellants were protected by the proviso in subs. (c.) if they had been innocent of any intention to induce a buyer to purchase something which he would not otherwise have purchased. The magistrate, however, held that the appellants would not rely on subs. (c.) as a defence unless they had been innocent of any knowledge or reasonable ground of suspicion at the time of sale that the trade mark was in fact forged. The Court reversed the decision of the magistrate, and held that he was wrong in the construction he had placed on the words in subs. 2 (c) viz.:—"that otherwise he had acted innocently." The words "acting innocently" mean something outside the things stated in subs. (a) and (b) and include innocence of any

intention to infringe the provisions of the Act, and it was sufficient that the appellants had shown that they had no intention to infringe its provisions.

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Impossibility of performance may appear on the face of a contract, or may exist unknown to the parties at the time of making it, or may arise after a contract is made. But the last-mentioned impossibility does not, as a rule, excuse the party charged from performance of this contract. In the old case of *Paradine v. Jane* (Aleyn 26), the plaintiff sued the defendant for rent due upon a lease. The defendant pleaded in substance that the rent was not due because, through the invasion of the realm by Prince Rupert, he had been deprived by events beyond his control of the profits from which the rent should come.

But the Court held that this was no excuse; "and this difference was taken that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. . . but when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." To this general rule there is a group of exceptions, one of which is that legal impossibility, arising from a change in the law of this country, exonerates the promisor. In *Wilson v. Durham* (35 L.J. 435) defendants let premises to the plaintiff for three years, and agreed, at the expiration of that time (in the event of a certain notice being given by the plaintiff, which was done) to grant the plaintiff a new lease of the same premises for 21 years, and further agreed, in the event of the notice being given to raise the messuage by the addition of one story, and make other structural alterations. During the above term of three years a fire des-

troyed these premises, as also the adjoining premises occupied by the defendants. There was no breach\* of the agreement before the fire, but it was impossible for the defendants to rebuild the plaintiff's premises according to the agreement, because of certain alterations in the by-laws of the District Council. Cozens Hardy, J., held that the argument of the defendants—that no damages could be given in an action for specific performance of an agreement which was rendered impossible—was not tenable; but found that there was no repudiation by the defendants of the contract, that time was not of the essence of the contract, and that there was an implied condition that the premises occupied by the defendants should be standing at the time of the proposed new addition. The action was, therefore, dismissed.

That case involved the same principle which was decided in *Nickoll and Knight v. Ashton, Edridge and Co.* (109 L.T., 60), and which we referred to at p. 495 of Vol. XXV., where Mathew, J., held in the case of a ship stranded in the Baltic without fault on either side, and so damaged that she could not reach the Egyptian ports during the month of January to receive cargo according to contract, that it was an implied term of the contract that if the ship did not reach the loading ports during January in a fit state to receive the cargo, the contract, having become impossible of performance, should be treated as at an end. But in the above case of *Wilson v. Durham*, Cozens Hardy, J. does not appear to have sufficiently considered (if it were brought to his attention), the case of *Baily v. Crespigny* (L.R. 4 Q. B. 180), where it was held that an impossibility created by Statute excuses a party from the observance of a covenant. As a District Council's byelaw is, in fact, a development of a Statute, and created thereby, it is difficult to reconcile his dictum with the decisions of older cases. No substantial

grievance was however done, as he arrived at an appropriate conclusion by another road.

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The Prevention of Cruelty to Children Act, 1894 (57 and 58 Vict., c. 41), enacts (s. 1) that "if any person over the age of 16 years who has the custody, charge, or care of any child under the age of 16 years, wilfully assaults, ill-treats, neglects . . . such child . . . that person shall be guilty of a misdemeanour." In *Ottley v. Fenn* (109 L. T. 175), a Mrs. H. was living with the defendant Fenn; she had several children by her husband, and these children lived with the unmarried couple. An information having been laid against this couple, under the above Act, for neglecting the children, the justices convicted Mrs. H., but dismissed the case against Fenn, thinking that the paramour of the mother was not a person having the "custody, charge, or care" of the children within section 1 of the Act. The Divisional Court (Grantham and Channell JJ.) held, on a case stated, that when a man and woman are married, the husband is *ipso facto* the person who has the custody, &c., of the children, and proof alone of neglect of the children is required; but when the parties are not married evidence is required, firstly, that the man in fact has the custody, &c., of the children, and, secondly, that he did neglect them. This interpretation of the section is obviously very sound, and determines an intricate point.

SHERSTON BAKER.

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## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*The Law and Practice of Rating.* BY WALTER C. RYDE. London: Shaw & Sons. 1900.

This is an important work on an important subject. With a Quinquennial Valuation in progress, the subject is painfully important to many of us, who are being subjected to the operation of having our valuations "screwed up," in order that Public Bodies may be enabled to spend increased sums on various objects, which they consider for the public welfare, without at the same time appearing to increase the burdens of the unfortunate ratepayer by raising the rate in the pound. There is probably no person better qualified, both by ability and experience, than Mr. Ryde, to treat this subject adequately, and he has produced a remarkable book. It is remarkable in two ways, first for the enormous amount of conscientious labour which it displays, and secondly for the courage of his opinions which Mr. Ryde manifests. His treatment of the case law, and after all, the law of rating is mainly case law, is both masterly and exhaustive. One feels convinced that every case cited has been read and considered, both from the point of view of principle, and that of comparison with the cases decided before and after it. This is a feature of the work which will, we think, render the book particularly valuable to practising lawyers, as, even when a case is cited as a definite authority for a proposition, reference is always given to any other case which may seem to shake or qualify it, and to those parts of the judgment which are not, in the author's opinion, sound. The book is divided into two main parts, namely the Law, and the Practice. The former commences at the very beginning of the subject with "the persons liable to be rated." The Law of Rating is peculiar in many ways, and the *hypothetical tenant* is a creation of the law, whose habits of occupying property of various sorts, and carrying on gigantic businesses on a somewhat insecure tenure, strike us as somewhat remarkable; but what must impress anyone after perusing Mr. Ryde's work is the uncertain state of the law on so many important points, both of law and practice. Mr. Ryde is too experienced and conscientious an author to allow his modesty to induce him to profess a

doubt where he does not feel it, but again, and again, he has to use expressions like "the law is not clear," or "it is doubtful" or "it is difficult," and after examining the cases we agree with him. As an instance, we see that the difficulty commences at the very root of the subject, which is "*occupation*." Mr. Ryde only makes "an attempt" to explain it, and quotes the judgment of Lush J. in *R. v. St. Pancras*. "It is not easy to give an accurate and exhaustive definition of the word 'occupier,'" and the definition ultimately given is that from *Clark and Linlsell on Torts*, "*a de facto possession, that is to say, actual physical prehension of the particular portion of the soil, to the substantial exclusion of all other persons from participating in the enjoyment of it.*" It also would seem that in spite of the decisions in the *Mersey Docks* and other cases, the positions of reformatories and industrial schools are not quite clear, nor that of property maintained for civil purposes out of public money. We could also wish for a little more certainty on the subject of "Tolls." *Beneficial occupation* is fully treated, and the fallacy is pointed out that runs through so many of the earlier decisions "that the receipt of a profit is essential to the existence of rateability." Though the fallacy was very much shaken by the decision of the House of Lords in the *Mersey Docks* case, it was only finally exploded by the decisions in *R. v. School Board for London; Mayor, etc., of Burton-upon-Trent v. Burton-upon-Trent Union* and *London County Council v. Erith and West Ham*. These cases illustrate the important fact that the thing to remember in considering the rateability of property is, whether it is of *value* to the occupier, not whether it is *profitable* to him. With this principle Mr. Ryde is saturated to the very bone, and to this he owes much of his thorough grasp of his subject. We would like particularly to call attention to the discussion on the well-known term "*struck with sterility*." It is so often misapplied, that a clear and searching analysis of what the term really means is very valuable. We agree with Mr. Ryde in his remarks on the *London County Council's Sewers Cases*, and are unable to draw a distinction as regards rateability between sewers above ground and *under* ground. Another difficult subject well treated is as to when evidence can be given of the occupier's profits, a subject peculiarly connected with public houses. Some of the difficulties of rating law may, perhaps, be traced to the remarkably little assistance rendered by the Legislature. We doubt whether there is any other branch of law of equal importance, as to which so little legislation has taken place. All this, too, in spite of the difficul-

ties being so apparent, that in one case "the Court delayed giving judgment in the hope that Parliament might interpose to relieve the judges from the difficult position in which they were placed when called upon to administer the existing law with respect to the rating of railways," by laying down some new rule. But judgment was delivered without the fulfilment of the hope, which indeed still seems as far off as ever. This case was *R. v. Great Western Railway Company*, and the question was how to rate running lines, extending into several parishes. "This problem has given rise to a conflict of decisions, probably greater and more irreconcilable, than any other problem in the law of rating." In one class of cases the rateable value has been calculated on what is called the *parochial principle*, and in the other on what is considered is the *contributive value* of the line. The parochial principle on the whole seems to have prevailed, but Mr. Ryde considers it is based on a fallacy, and argues powerfully and logically against it, both in the body of his work, and at greater length in the Appendix, but he is doubtful whether even the House of Lords would over-rule a series of cases, that has been acted upon for so long, in favour of his "heretical" views.

The practice is full of difficulties and pitfalls, and the practitioner will find these difficulties set out and discussed by the light of a wide experience. We may particularly call attention to the discussion of the important question, whether an appeal from Special Sessions to Quarter Sessions is governed by s. 31 of the Summary Jurisdiction Act, 1879. In his opinion that it is not, Mr. Ryde differs from, we believe, more than one text book of authority, but we are inclined to think his contention is correct. Want of space forbids us to do more than call the reader's attention to other difficulties connected with the appeal from Special Sessions, and with Provisional lists, and also the doubtful points which the passing of the Local Government Act, 1894, and the London Government Act, 1899, have given rise to. We should also have liked to have further illustrated Mr. Ryde's courage, before referred to, which he displays in the fearless manner in which he criticises the judgments of the Highest Courts, and the greatest Judges, and even differs from the Attorney General; but the reader will always find much food for reflection in such criticisms. We may notice as a slight proof of the care and labour that has been bestowed on this work, that we constantly find references to, and comparisons of, the different reports of the same case.



*The Law and Practice relating to Letters Patent for Inventions, with full Appendices, Statutes, Rules and Forms.* By ROGER WILLIAM WALLACE, Q.C., and JOHN BRUCE WILLIAMSON. London: William Clowes & Sons. 1900.

This work is one which will immediately be recognised as a leading authority on Patent Law. It was, in fact, eulogistically referred to within a few days of its publication by the Lord Chancellor in the course of a judgment in the House of Lords (see *Walter v. Lane*, 69 L.J. Ch. at p. 705).

Our Patent Laws have of recent years received considerable expansion by the Legislature and the Judges, and even now questions of importance are receiving the consideration of a Committee appointed by the Board of Trade with a view to further development of the law. Moreover, owing to the increasing adaptation, by inventors, of modern scientific discovery to a variety of economical, practical, and artistic purposes, the subject of patents has never been of greater importance than at present. The time, therefore, is opportune for the publication of a comprehensive and lucid exposition of the Patent Laws. Such an exposition is to hand in the work now under review.

Though the volume, which, including the index, contains over nine hundred pages, is uniformly of a high standard, the excellence of the work in certain chapters especially deserves remark.

The first chapter gives an interesting synoptical view of the early history of the Patent Laws, a knowledge of which is essential to a proper understanding of the modern law.

In Chapter II. on "The Grant: its terms and effect," the form of the Letters Patent and the archaic phraseology used in the Grant are fully explained and discussed in detail. This subject has not been adequately treated, so far as we are aware, in any of the existing text books on Patent Practice, owing, no doubt, to the fact that the form of the Grant has come under discussion by the Courts in very few reported decisions, the conflict in the bulk of modern cases being as to the sufficiency of the specification.

The subject of Compulsory Licenses which has come into prominence during the last two or three years is treated more fully than in any other text book, with the exception of Mr. Gordon's monograph on the subject. Messrs. Wallace and Williamson justly criticise the existing tribunal which exercises jurisdiction in granting compulsory licenses, and the present procedure in obtaining them. It is to be hoped that improvements in the law

will result from the inquiry of the Board of Trade Committee upon the subject.

The practice before the Privy Council in obtaining a prolongation of a patent is very carefully considered in Chapter XX. on "Extension of the term of Letters Patent."

The long chapter on the Rights of the Patentee under, his Letters Patent and the Law of Infringement is of particular value, as also is the following chapter (Chapter XXII.) on the Action for Infringement. We venture to think, however, that too much space is given to the consideration of the principles upon which the Court acts in granting an interlocutory injunction, it being notorious that in patent actions it is almost impossible to obtain an interlocutory injunction. The law as to the measure of damages in actions for infringement is more satisfactorily treated than in most of the text books.

That the book is well up to date is evidenced by the reference (on p. 123) to the judgment of Buckley J., in the recent important case, *The Welsbach Incandescent Gas Light Co. v. The New Incandescent Gas Lighting Co.* (1900) 17 R.P.C. 237, though it is perhaps to be regretted that the publication was not held over for a few weeks so as to include such important decisions as those in the *Electric Construction Co., Ltd. v. The Imperial Tramways Co., Ltd.* (June, 1900), 17 R.P.C. 537, and *In re Marshall and Naylor's Patent* (June, 1900), 17 R.P.C. 553.

The index is complete and carefully done, and the table of cases is remarkable for a novel feature, as it contains the subject matter of the patent in each case in brackets after the name and before the citation. There is an appendix containing a most valuable collection of forms and precedents. The specifications of the Welch Tyre Patent are given as examples of specifications of a mechanical invention, which, it is interesting to note, were closely scrutinised in all the Courts, and although drawn by the inventor himself, without the assistance of a patent agent, were finally upheld by the House of Lords.

The work, in short, is one which will prove of the utmost value in practice, and constitutes a distinct gain to the literature on the subject.

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*The Practice of Private Bills.* By GERALD JOHN WHEELER, M.A., LL.B. London: Shaw and Sons. 1900.

Till quite recently it was excessively difficult to find out from books anything about the practice of Private Bills, and beyond

Erskine May and the published standing orders of the two Houses, we do not know what could have been recommended. But in the last few years more than one book has appeared on this subject, and now Mr. Wheeler has contributed a book in which, we think, there will be found, as much of the practice as can be collected from the sources which are accessible, and which does not depend on the unwritten laws of the Committees. The arrangement is logical and good, and numerous cases are cited, mostly from the reports of proceedings before the Referees, in support of the propositions laid down. We do not notice any reference to an important ruling of a Committee, which is not however, we believe, adhered to, that no counsel should be allowed to cross-examine who had not been present during the whole of the examination-in-chief. There is a useful table of abbreviations, but the explanation of "R & S" has been omitted. We think some more information as to costs would be acceptable, as it is not stated under what circumstances either the promoters or the opponents of bills are ordered to pay costs, nor how such costs can be recovered. Neither is there sufficient information given about Parliamentary Agents, and in a few respects the index is defective. A very valuable feature of the work is the collection of the rules of the various Government offices in respect to obtaining Provisional Orders. The book will certainly be of great assistance to all those concerned with Private Bills or Provisional Orders.

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*Collision: Warship v. Merchant Vessel.* By DR. N. MATSUNAMI.  
London: Hicks, Wilkinson and Sears. 1900.

We are glad to welcome another contribution to our legal literature from one of the school of jurists that has been formed in Japan. Dr. Matsunami has selected an interesting subject for his treatise, and discussed it with an amount of ability and erudition remarkable in one discussing in a foreign language a foreign law. Although the real point which it is wished to establish is, the declaration that Governments shall be liable for injuries, caused by the negligent navigation of their warships, to merchant vessels, there is a great deal more than that in this work. The whole question of responsibility for collisions is treated carefully and thoroughly. The origin of the Court of Admiralty, the maxim that the King can do no wrong, the responsibility of executive officers, and the origin and practice connected with Petitions of Right are all exhaustively treated. The con-

clusion that the learned author comes to is that, in no country can the Crown be sued in any form for damage inflicted by its warships, and that this immunity is unjust and inexpedient. The remedies proposed are, either the establishment of a permanent international tribunal for the trial of cases of collision between warships of all nations and merchant vessels, or that the Municipal Court of the country to which the guilty warship belongs, should try such cases and grant compensation. In theory there seems great force in Dr. Matsunami's contentions, but we are not sure that in practice, in England at any rate, there is substantial injustice at present. According to the author's own statements, the negligent officer of the warship can always be sued, and the Admiralty invariably takes up the defence and pays the damages, if any are awarded.

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*Historical Jurisprudence.* By GUY CARLETON LEE, PH.D. London: Macmillan. 1900.

Although Professor Holland objects to the term "Historical Jurisprudence" it is a very convenient one, and the description of its function as given in Dr. Lee's introduction explains clearly in what sense it is used. "Historical Jurisprudence deals with law as it appears in its various forms and at its several stages of development. It holds fast the thread which binds together the modern and the primitive conceptions of law, and seeks to trace, through all the tangled mazes which separate the two, the line of connection between them. It takes each custom as enforced by the community, and traces its development. It seeks to discover the first emergencies of those legal conceptions which have become a part of the world's common store of law, to show the conditions that gave rise to them, to trace their spread and development, and to point out those conditions and influences which modified them in the varying course of their existence." The principle of selection that has been adopted has been to select "either those which have contributed to the great stream of scientific jurisprudence, or those which flow from it. They are grouped around the jurisprudence of Europe or of the countries which owe to it their civilization." The work is divided into three parts: The Foundations of Law: The Development of Jurisprudence; and The Beginnings of Modern Jurisprudence. The first includes the laws of Babylonia, Egypt, Phoenicia, Israel, India and Greece. The second treats of various periods of Roman law, Canon law, and barbarian codes.

The third deals with the renewed study of Roman law, and its reception, and concludes with early English law. This will show what a number of important systems of law Dr. Lee considers, and his treatment of each is characterised by legal and historical knowledge. The book throughout is marked by clearness of exposition and breadth of view, and will form a welcome addition to the libraries of students of history and jurisprudence alike.

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*Ruling Cases. Arranged, Annotated, and Edited.* By ROBERT CAMPBELL, M.A., with American Notes by Leonard A. Jones, A.B., LL.B. London: Stevens and Sons, Limited. 1900. Vol. XX. Payment—Purchaser for Value.

The most important subjects treated in the present volume are "Power," and "Purchaser for Value without Notice." The latter is particularly worth consideration, as some of the principles discussed may apply to registration under the Land Transfer Acts, the scope of which is being so much developed. The same care and ability has been shown as in previous volumes; and we think the principles of the English Law receive rather more than usual support by agreement with the American cases.

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*Principles and Practice of Conveyancing.* By JOHN INDERMAUR. London: Geo. Barber. 1900.

*Halliday's Law and Practice of Conveyancing.* Second Edition. By RICHARD HALLILAY. London: Horace Cox. 1900.

Both these works are intended primarily for the use of students, but also for the use of practitioners, and both in their different ways are well adapted for these purposes. Mr. Indermaur has had a very large experience, both as an author and a teacher, and has in consequence an unusual power of extracting the parts of a subject which are most material, and setting them before the reader in a remarkably lucid way. The great feature that strikes us throughout, is the manner in which the legal principles with which he deals, and such details of practice as he gives, are explained, and reasons for them given. As a result he has actually rendered that usually dry science, Conveyancing, interesting, and to make a book interesting goes a long way towards making a student understand and remember it. The book is practically, but not exclusively, divided into two parts, Principles and Practice; although, of course, the two are necessarily fre-

quently interwoven. As an example of the clear manner in which difficult and complicated questions are treated, we may call attention to the dissertation on the rights obtained by a husband by marriage. Of course, in both law and practice there is much that might be added, but we think the most material points required to be known either by students, or practitioners in the ordinary way will be found. The only omissions we have noticed, which we think it would be an improvement to rectify, are some description of bonds, a note on the appointment of guardians, and some information on proving descent and pedigrees. Mr. Indermaur thoroughly disapproves of and severely criticises the system of Registration under the Land Transfer Acts.

Mr. Hallilay's book is written in a different style; it is not so popular, or explanatory, but it is packed with information, concisely but clearly conveyed, and he deals with more subjects, and many of them in more detail, than Mr. Indermaur does. There are very few subjects with which a Conveyancer is likely to deal, on which he will not find some very valuable information. As far as we have been able to test, it is very accurate, but we hardly think the doubt thrown on the validity of a condition for the payment of compound interest is justified. There are a few subjects, such as Building Societies, on which more information is required, and we think that it would be an improvement to have, as is usual in most law books, a table of the Statutes cited.

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### NEW EDITIONS.

Third Edition. *Theory of International Trade.* By C. F. BASTABLE, M.A., LL.D London: Macmillan. 1900.

This very interesting treatise is primarily meant for serious students of economic theory, but is well worth the attention of all interested in economic problems. By emphasizing the importance and the nature of Foreign Trade, Dr. Bastable will exercise a valuable influence on opinion, and will do much good by impressing clearly on the public mind, what are the conditions under which Foreign Trade will flourish, and in discussing once more the well-worn but ever-recurring subject of Protection. The chapters on Taxation for Revenue, and the Rationale of Free Trade will, we think, prove more interesting to the ordinary reader than the more difficult subjects of International Values and Foreign Exchanges, and the

chapter on Arguments for Protection—Reasons for its prevalence, will assist many, who, while believing in the soundness of Free Trade themselves, are disquieted in their faith by the great mass of contrary opinion on the Continent and in America. Dr. Bastable's conclusion as to *conduct* is worth noting. "Governments in their dealings with foreign trade should be guided by the much-vilified maxim of *laissez faire*. To avoid misinterpretation, let it be remembered that the precept rests on no theory of abstract right or vague sentiment of cosmopolitanism, but on the well-founded belief that national interests are thereby advanced, and that even if we benefit others by an enlightened policy, we are ourselves richly rewarded." The usefulness of this valuable little work would be greatly enhanced by having an index added to it.

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Fourth Edition. *Principles of Pleading*. By W. BLAKE ODGERS, M.A., LL.D., Q.C. London: Stevens and Sons, Limited. 1900.

This well-known work sets forth with admirable clearness the principles of pleading, practice, and procedure in civil actions in the High Court, combined with much excellent advice on tactics and advocacy. The principal addition to the present edition is a new chapter entitled "Summons for Directions," necessitated by the late amendment of Order XXX. This chapter deals with the principles on which directions are given under that order, without dealing with all the difficulties which are discussed by Mr. Stringer in his well-known work on the subject. While agreeing with all the author says as to the dangers of cross-examination to the counsel employing it injudiciously, we think quite sufficient emphasis has not been laid on the bad effect apt to be produced on the jury, and even on the judge, by the too severe treatment of a witness. We notice that in one of the precedents of advice on evidence the initials of one eminent counsel have been substituted for those of another given in the last edition, and who is since deceased.

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Fifth Edition. *Precedents of Deeds of Arrangement*. By ARTHUR LAURENCE, M.A. London: Stevens & Sons, Limited. 1900.

There are about 13 precedents in this useful little work, including Deeds of Conveyance and Assignment, Deeds of Inspectorship, Deeds of Compensation, &c. There are no very special provisions

introduced, but the forms are good working forms and can, with the help of the valuable and very practical introduction, be adapted to meet special circumstances. The volume also contains the Deeds of Arrangement Act, 1887, very fully annotated, the Deeds of Arrangement Act Rules, both of 1888 and 1890, with all Rules and Forms under them, and sections of, and orders under the Bankruptcy Acts, 1883 and 1890.

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Fifth Edition. *A Concise Treatise on the Law of Wills.* By H. S. THOROLD, Q.C. London: Stevens & Sons. 1900.

Some idea of the magnitude of the Law of Wills may be gathered from the fact that the body of this "Concise Treatise" consists of 744 pages, although its bulk may be partly due to the excellent print and wide margins of the book. New cases are constantly being decided on Wills, and it is more these that will have to be looked for in this edition, than any new legislation or striking developments of the law. Although the Land Transfer Act, 1897, has made "important changes in the law relating to testamentary dispositions," hardly any cases under it are reported. That the book is concise can be easily seen, when it is noticed that the table of cases contains nearly 130 pages. This conciseness never leads to obscurity, though it is sometimes rather provoking to have an interesting point merely suggested by a reference without any information being given on it. For instance, we find in the Index, "Cremation, whether Legal," but on turning to the page we only find, "Upon the question of Cremation, see the cases of *R. v. Pye*," and two other cases. The subject of a promise to leave property by will is similarly treated. Both these references show in what a very thorough manner the index has been prepared, which is unusually full and complete. A chapter which will at the present time be read with much interest, and one that will possibly require to be often consulted is Chapter VII., "Wills of Soldiers and Seamen." Considerable additions have been made to some of the chapters, and the cases decided since the last edition added. It would, we think, be an improvement if, as is so frequently the case now, the dates of all the decisions were given.

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Seventh Edition. *Broom's Legal Maxims.* By HERBERT F. MANISTY, LL.B., AND HERBERT CHITTY, M.A. London: Sweet and Maxwell. 1900.



A book of principles does not often go through so many editions as a book of practice, because it must be supposed that well-established principles do not vary. However, the fact that this book, which is described by Professor Holland, in the preface to the first edition of his well-known work on Jurisprudence, as being one of the first books that attempted to discuss the general principles of English law, has now reached its seventh edition, shows that it has attained a success which we are bound to say it deserves. It is more a book for the student than the practitioner, but may often supply the latter with illustrations for his arguments. If the student, or other reader, thoroughly studies the various maxims treated in the work with the illustrations, he will not only acquire a considerable and varied acquaintance with the law, but he will probably have acquired a habit of grasping principles from a comparison of cases, which should be of the greatest service to him.

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Ninth Edition. *The Elements of Jurisprudence*. BY THOMAS ERSKINE HOLLAND, D.C.L. Oxford: The Clarendon Press. 1900.

Among the many books published at the Oxford University Press, there is probably no better known law book than the one now before us, if it is not doing it rather an injustice to call it a "law book" in the ordinary sense of the term. Professor Holland's work is known and valued by every student of jurisprudence, has been consulted by, and is referred to by all writers of eminence on its subject, English and Foreign, and what is perhaps not less eloquent of its success, has now reached its ninth edition. There is nothing new to be said of the character or arrangement of the work—the first edition of which was reviewed in this magazine by no less an authority than Professor Dicey—but the reader will find new matter of considerable interest. Some important cases have been decided since the last edition, notably *Allen v. Flood*, which is more than once referred to, and in the *London Street Tramways Co. v. London County Council*, an important doctrine was laid down as to the finality of the decisions of the House of Lords. There are one or two slight additions, which we might suggest to Professor Holland for his consideration, in producing his next edition. One is that he should modify his statement as to the right of the public to the use of the Highway by a reference to the case of *Harrison v. Duke of Rutland*, and again in alluding to the remedies for marital misconduct

he should include that of Judicial Separation. Perhaps, too, it would render his note on the practice on the Continent of requiring security for costs from a foreign plaintiff more complete if he mentioned that such security is required in England, when plaintiff resides abroad.

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Thirteenth Edition. *Tristram and Coote's Probate Practice*. By THOMAS HUTCHINSON TRISTRAM, Q.C., D.C.L. The Common Form portion revised by HENRY A. JENNER. London: Butterworth and Co. 1900.

This well-known book is divided into Coote's Common Form Practice and Tristram's Contentious Practice. Dr. Tristram's contribution was added to the second edition of Mr. Coote's work: was published in a separate form after the passing of the Judicature Acts, and was re-united in the fourth edition in 1888. Before the original publication of Mr. Coote's work, the principles which regulated the granting of Probates and Letters of Administration were unknown to anybody, except the Proctors, who were a close body, and practised their mystery in the manner so humorously described in David Copperfield. This general ignorance of the rest of the legal profession, Mr. Coote's work did much to dispel, but it remains a troublesome branch of practice, as so much depends on "the practice of the registry," and without a thoroughly trustworthy work like the present to rely upon a solicitor could only move with fear and trembling. A new edition has been rendered necessary by certain alterations in the Practice, which have been made by rules of court, and also the passing of the Land Transfer Act, 1897, and the rules made under that Act. The portion on the Contentious Practice is equally thorough, and has been carefully revised, though it reads somewhat like a slip on page 446 that "The President (Sir James Hannen) was a party to the judgment, and adheres to it in the Probate Court"; and the work would have been more up-to-date had there been some reference to hypnotism in connection with *undue influence*. The appendices contain all the most important statutes and orders dealing with the subject and a large number of useful forms.

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Fifteenth Edition. *Williams on Personal Property.* By T. CYPRIAN WILLIAMS. London: Sweet & Maxwell, Limited. 1900.

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We are glad to welcome a new edition of the late Mr. Joshua Williams' well known work, the three previous editions of which have been edited by his son, who also edits the present edition. So much of re-editing was done to the last edition that there was not much cause for alterations in the present one, but it has had the recent authorities added and considered. The one which seems to have given the learned editor most work is *In re Leng, Tarn v. Emmerson*, which is frequently referred to, and has necessitated the re-writing of part of the chapter on Debts. The decisions under the Finance Act, 1894, have also had to be considered and digested. It is rather a pity that *choses in action* should not be always so described, but should be sometimes spoken of as "things in action," though we know the editor has the authority of an Act of Parliament for the term. There are two or three misprints, notably the expression of a person's *decrease* instead of his *decease*, which detract somewhat from the appearance of the book. On the whole, however, and considering all the ground that is covered, the accuracy of the book is remarkable, and there is no doubt but that it will keep the high position it has so long held, not only as adapted for the use of students, but as a compendious and trustworthy authority on the very important branch of law of which it treats.

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Seventeenth Edition. *Roscoe's Nisi Prius Evidence.* By MAURICE POWELL, M.A. Two vols. London: Stevens and Sons. 1900.

No law book is better known than this, and no law book is more useful. It is indispensable to the practitioner, and is especially useful on Circuit or on other occasions when recourse to a library is difficult or impossible. Of course, it has the disadvantage of being in two volumes, but that could not be avoided, and in the present edition Mr. Powell has succeeded in even reducing the bulk by something like a hundred pages. Something had to be sacrificed to attain this, and after, no doubt, mature deliberation, the headings comprising Bankruptcy, Copyright, Trade Marks, and Patents have been omitted, as being "dependent on statutes of so special and intricate a character that the law relating to them would be more conveniently ascertained by reference to

separate treatises." These omissions detract somewhat from the usefulness of the book, but convenience of size is of such importance in a work like this, that the course followed was probably justified. As far as we have been able to test it, the work has been revised with all the care and accuracy that characterised the former editions. The only omission we have noticed is that there is no reference to either Maintenance or Champerty beyond a reference to the case of *Bradlaugh v. Newdigate*, under the heading of "Illegality, as a defence to Actions on Simple Contracts," and neither *Alibaster v. Harness* nor *Harris v. Brisco* is cited. The tables of Cases and Statutes cited take up something like 150 pages, and there is a useful table of Reports contemporary with the Law Reports, but the dates of the cases are not given, nor reference made to more than one set of Reports.

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*The Maritime Code of the German Empire.* Translated by G. W. ARNOLD. London: Effingham Wilson. 1900. This is simply a translation of the German Maritime Code which was passed in May, 1897, and came into force on the 1st of January of the present year. It is a translation without any notes or references, but contains in an appendix the 1872 Regulation for Seamen, and is provided with an index.

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*The Constitution and Laws of Afghanistan.* By Mir MUNSHI SULTAN MOHAMMED KHAN, F.R.G.S. London: John Murray, 1900. An interesting dissertation on a country with which we have been much connected, and may be more. The learned author chose his subject, partly because it was difficult "to find a legal subject on which anything new or original can be said." But his principal object was to give students "the opportunity of comparing the modern laws of the most advanced European countries with the immature laws of a country which is now only just emerging from a state of lawlessness." There is much worthy of the attention of students of jurisprudence and constitutional laws. We may particularly call attention to the chapter on "The Title to the Crown."

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Second Edition. *Evans's Law relating to the Remuneration of Commission Agents.* By W. DE BRACY HERBERT, M.A., LL.M. London: Horace Cox. 1900.—The second edition of this useful

little book has been thoroughly revised, and some additions made. The chapter which will perhaps be considered at the present time the most important, namely, the one on "Secret Commissions and Trade Discounts," has been expanded and many additional cases, both new and old, included. All the reports are now cited in the table of cases, but in the body of the work, as a rule, only one is given.

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*The Rating of Licensed Houses.* By WILLIAM H. WELLSTED. London: A. Brown and Sons, Limited. 1900.—This handsome and well-printed volume is entirely devoted to a full report of the recent case of *Cartwright v. The Sealecoates Union*. It is an interesting illustration of an important principle, but, after all, as Lord Macnaghtan said, it was a very simple case, and was a question of common sense and not a question of law. It does not, we think, justify a report containing every detail, and the most trivial observations of Counsel and Judges.

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*Registration of Deeds* By JOSEPH MAGUIRE. Dublin: Hodges, Figgis and Co., Limited. 1900.—This is a work of great industry and ability, and should be of the greatest assistance to practitioners in Ireland. It is not of the same value to those in this country, but it is interesting to note the differences in the laws of the two countries, and anything relating to Registration may possibly turn out to be of some assistance in dealing with the practice now being established in England under the Land Transfer Acts.

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Thirteenth Edition. *Paterson's Licensing Acts.* By WILLIAM W. MACKENZIE, M.A. London: Shaw and Sons, 1900.—The present edition of this well-known and valuable work has, like the previous ones, been edited by Mr. Mackenzie. That it still maintains its popularity with the legal profession is shown by the fact that, although the last edition only appeared in August, 1898, it has all been sold out. There have not been many important Statutes passed or cases decided since then, but what there have been we may rely on finding in the notes, and it remains a trustworthy guide over a district full of difficulties. In the appendix is given the case of *Boulter v. Kent J.J.*, reprinted from the last edition, and also that leading case in Licensing Law, *Sharp v. Wakefield*.

*Metropolitan Borough Council Elections.* By John Hunt. London: Stevens and Sons. 1900.—With these elections just coming on it is a comfort to be able to turn to a guide as competent as Mr. Hunt. The necessity of his services is truly pointed out, when in his preface he declares that "in order to ascertain the law upon the subject, it is necessary to search through, dissect, and piece together a bewildering entanglement of Acts, and sections and sub-sections of acts, rules, orders, and cases, with endless provisos, modifications, and exceptions, upon the interpretation of which even the experts are not unfrequently at variance." The necessary information for a candidate, or returning officer is clearly and concisely set out, and opinions given on doubtful points. About half the volume is taken up with the Election Order, 1900, which is fully set out, and contains rules for the conduct of the elections.

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Third Edition. *Cababé on Attachment, Receivers, and Charging Orders.* London: Sweet and Maxwell, Limited. 1900.—In the new edition of his useful little work, Mr. Cababé has made an improvement by adding a chapter on Charging Orders. Like the previous arrangement of Attachments and Receivers, this new chapter has its own separate appendix of forms and index.

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*Studies in Private International Law.* By ÉMILE STOCQUART, D.C.L.—In this interesting *brochure* the learned author points out the most important legal views on Marriage in Spain, France, Belgium, Holland, Germany, Austria, Hungary, and Switzerland, and on Divorce in France and Germany. The laws of foreign countries on those points are of special importance in England, where the principle is established that the form of the contract is governed by the *lex loci contractus*, and it is most important that any English person marrying a foreigner shall be acquainted with the law of the Foreign State, as otherwise it may turn out that the marriage is void in that State. This caution is particularly necessary as regards France. This little book is a valuable and suggestive contribution to the literature of Private International Law.

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## CONTEMPORARY FOREIGN LITERATURE.

*Della Transazione secondo il Diritto Romano.* By CESARE BERTOLINI, Professor in the University of Turin. Turin, 1900.

This large and handsome volume seems to contain all that can be known of the Roman law of *transactio*. The term has a connotation rather different from that of the English "compromise," in fact, in the French Code, *transiger* is distinguished from *compromettre*. As a modern English term of law "transaction" does not exist. Milton, however, uses it in something of its juristic sense in

"Shall mortal man transact with God?"

The learned author admits that he is travelling over old ground since Valerius (1665). His bibliography seems exhaustive, and his definition on p. 33 is less open to criticism than most definitions. By defining it as a convention he ranges himself on the side of those who class it as an obligation rather than of those who would make it the discharge of an obligation. The fact that Roman law regards it as equivalent to *solutio* is perhaps the strongest argument in favour of the latter view.

Roman law allowed *transactio* in criminal cases to a greater extent than English law allows compromise. English law has nothing corresponding to the *transactio* to avoid *infamia*, by which the offender submits to a heavier penalty than would otherwise be inflicted, in order to avoid *infamia*. All this is discussed at length by Professor Bertolini, as is also the curious rule as to *transactio alimentorum*. From Dig. ii, 15, 8, we learn that where *alimenta* were bequeathed by will, or given by *donatio mortis causa*, a *transactio* was not allowed unless by judicial authority, express or implied. The object, no doubt, was that the object of the bounty should not be allowed to give up a provision for life or a term of years in return for some present benefit.

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 PERIODICALS.

*Journal du Droit International Privé.* 1900. Nos. V.—VI. Paris.

Professor P. Fiore, of Naples, begins a fruitful essay on the law governing quasi-contracts and quasi-delicts from the point of view of international law. In fact, it is an international law commentary on §§1370-1386 of the Code Civil. There is a report of *Pouey v. Hordern* [1900] 1 Ch. 492, with an opinion of the

editor that a French court would have decided the other way. There seems to be no mention of the immediately preceding case of *In re Price* [1900] 1 Ch. 442, which deals with a somewhat similar point.

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*Kosmodike.* June—Sept., 1900. Berlin.

There is a continuance of the symposium in both this magazine and the *Juristen-Zeitung* on what seems to have been for some time a vexed question in Germany, the admission of pupils of the *Real-Gymnasien* to the legal curriculum, which would mean the teaching of elementary law in schools of the higher class. The review contains interesting articles on the administration of justice in Morocco, on the special importance of comparative law in the domain of private international law, and on the future of the French bar. There are two articles in the English language, one a reprint of an article on Criminal Statistics in the August number of this magazine, the other on Prisons in England and America, taken from this magazine without any acknowledgment.

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*Deutsche Juristen-Zeitung.* 1 July—1 Sept., 1900. Berlin.

In an article on *Das Völkerrecht im Burenkriege* Professor von Rohland asserts, and probably with truth, that the Transvaal war affords instances of almost every question possible to be raised in the Laws of War. He complains of the insufficiency of the handbook issued by the Admiralty for the guidance of naval officers. He has, like most German jurists, strong Boer leanings. Whatever be the strict law, says he, from the ethical side, England has not acknowledged the maxim *justitia fundamentum regnorum*. There is a curious article by Freiherr von Bülow on the controverted question, whether a person not of noble birth can, on adoption by a noble, assume the aristocratic "von."

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*La Giustizia Penale.* 19 June—24 September, 1900. Rome.

There is a good deal of telegraph law, two decisions and a learned article by Signor Perroni-Ferranti in three numbers. The English lawyer will be surprised at the number of works by Continental jurists on the telegraph, e.g., Fuchs, *Einige Frage aus dem*



*Telegraphen rechte*; Serafini, *Il Diritto Telegrafico*. A curious case is one on p. 829, where it was held that an accusation of perjury against a witness as he was leaving the Court constitutes "outrage," and not "defamation," and that evidence of the truth of the accusation is not relevant. Another interesting question of evidence is decided on p. 935. A brought an action against B on a contract. B was referred to his oath and denied liability. The case was one which ought not to have been referred to oath, as the claim was over 1,000 lire. It was held that a prosecution for perjury against B must fail, as the oath was taken in proceedings which were not competent.

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*La Revue Générale*, *La Revue Bibliographique Belge*, *La Revue Sociale Catholique*, and *La Rivista Politica e Letteraria* contain nothing of legal interest, except one or two short reviews of legal works.

JAMES WILLIAMS.

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Received too late for notice in this issue:—*Baty's International Law in South Africa*; *Pollock's Law of Partnership*; *Macpherson's British Enactments in Native States (India)*, 3 vols.

Other publications received:—*Journal of the Society of Comparative Legislation*; *Supplement to Indermaur's Manual of Equity*; *Report of International Maritime Committee*; *Limitation of Shipowner's Liability and Salvage at Sea*; *Law of Legislative Power in Canada*. By A. H. Lefroy (Canada Law Book Co.); *Noble's Completion of Contracts by Mail and Telegraph*; *Limitation of British Shipowner's Liability* (North of England Protecting Association); *Register of the Incorporated Law Society*.

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Review of Reviews*, *Juridical Review*, *Public Opinion*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Accountants' Journal*, *North American Review*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Virginia Law Register*, *American Lawyer*, *Albany Law Journal*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Queensland Law Journal*, *Law Students' Journal*, *Westminster Review*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer (India)*, *Cape Law Journal*.

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